25th Anniversary of The Advocate

The Advocate

Journal of Criminal Justice Education & Research
Kentucky Department of Public Advocacy

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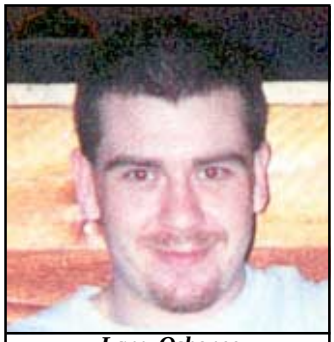
Innocent Kentuckians Wrongfully Convicted

William Gregory
Released July 5, 2000



Larry Osborne
Released August 1, 2002

Robert Coleman
Released September 17, 2002

Herman May
Released September 18, 2002

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Capital Trials - Joy Brown	#131
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Contract Payments - Ruth Schiller	#188
Deputy Public Advocate - Patti Heying	#236
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Juvenile Post-Dispositional Branch - Dawn Pettit	#220
Law Operations - Karen Scales	#111
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The Advocate:
Ky DPA's Journal of Criminal Justice Education and Research

The Advocate provides education and research for persons serving indigent clients in order to improve client representation and insure fair process and reliable results for those whose life or liberty is at risk. It educates criminal justice professionals and the public on defender work, mission and values.

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FROM THE EDITOR...

Ed Monahan

Innocence. Our cover features *The Kentucky Innocence Lineup*. There are innocent people in our Kentucky prisons. We do not like to think about it or admit it. Defense attorneys have always believed this but proving it was difficult in light of procedural hurdles and public and judicial opinion. Science, primarily DNA, is changing the lay of the land. We now know with scientific proof that innocent citizens have been wrongfully convicted and imprisoned for years. Leaders, legislators, judges, prosecutors and defense attorneys are starting to respond to the reality of innocence…but more, much more is required if we are to have a system that has a fair process that produces reliable results that the public will have high confidence in. There is an estimate that 4-10% of those in prison are innocent. The public believe 12% of those in prison are innocent. We review in this issue where we are in KY and what remains.

Prosecutorial Misconduct. "During the period under review, there was evidence of prosecutorial misconduct in 26 (47.3%) cases; nearly one-half of the 55 qualifying cases and a total of 55 instances of prosecutorial misconduct, thus an average of 2.11 (55/26) instances of prosecutorial misconduct occurred in each case involving prosecutorial misfeasance." This is a frightening finding of a recent Kentucky study of capital cases from 1976-2000. How could this be? Can the system tolerate it? Are Kentucky criminal justice leaders working to eliminate such behavior from our criminal justice system, especially in capital cases? The study's authors propose significant remedies.

Probable Cause. The US Supreme Court determines the law of the land on federal constitutional provisions. Are Kentucky judges following the Constitution's requirement that there must be a probable cause determination for a citizen presumed innocent no later than 48 hours?

Partnership Benefits Students & Clients. We feature an exciting partnership between Murray State and DPA. It is a way for students to benefit from pratical experience and DPA to benefit from the assistance of students in the representation of clients.

***Gideon's* 40th.** *Gideon v. Wainwright* is a watershed case that announced the right to counsel was a constitutional mandate. March 2003 is the 40th anniversary of this rule of law. We begin this issue a series of features by Patti Heying on Kentucky defenders who breath life into *Gideon* in our Commonwealth.

Ed Monahan, Editor

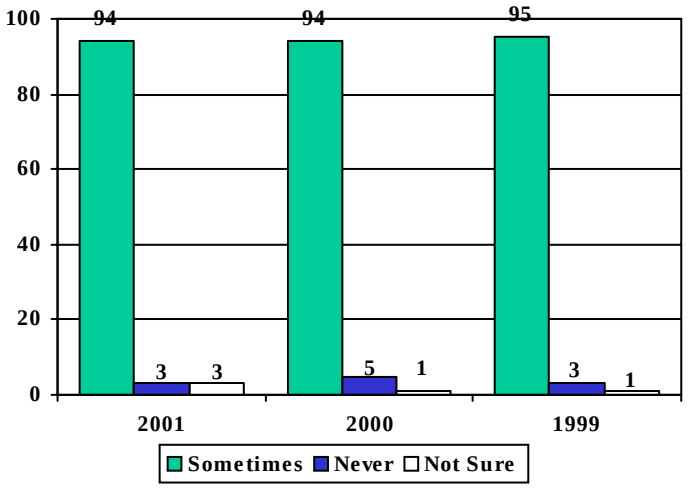
Wrongful Convictions of the Innocent: Kentucky's Recent Experience, Response, and Remaining Reforms

The nation has been startled by the repeated reports of innocent people being freed from prisons all across the country. The shock comes not from the justified release of innocent people, but from the sheer numbers of actually innocent people found in the nation's prisons. Nationally, 116 persons have been freed as a result of their wrongful conviction as of December 4, 2002.

The public overwhelmingly believes that innocent people are sometimes convicted of murder. The Harris Poll over the last 3 years asked the following question and had these results: "Do you think that innocent people are sometimes convicted of murder, or that this never happens?"

	Some-times %	Never %	Not Sure %
2001	94	3	3
2000	94	5	1
1999	95	3	1

Do You Think that Innocent People are Sometimes Convicted of Murder, or that this Never Happens?



"Almost everyone (94%) believes that innocent people are sometimes convicted of murder. On average they believe that 12% of all those convicted are innocent…. African-Americans, on average, believe that 22% of murder convictions are of innocent people, compared to 10% among whites and 15% among Hispanics." Humphrey Taylor, chairman of the Harris Poll, in THE HARRIS POLL #41, 8/17/01, http://www.harrisinteractive.com/harris_poll/index.asp?PID=252.

Innocent people have been sent to prison in Kentucky. No Kentuckian wants an innocent person incarcerated. The last two years have seen a lot of activity in Kentucky about the wrongly convicted that reflects the public's concerns. Kentucky has experienced the uncovering and freeing of the innocent in three documented cases: William Gregory, Larry Osborne, and Herman May. The public, Kentucky agencies, courts, prosecutors, public advocates and public policy makers have responded in a variety of ways. Improvements are in process and much more remains to be achieved.

William Gregory in Jefferson County

William Gregory, a 45-year-old Jefferson County man was convicted and sentenced to 70 years for the rape of a 70-year old woman in 1992. New DNA tests proved he did not commit that crime for which he served 8 years in prison. Businessman William Gregory was the first Kentuckian and the 74th nationally to be released as a result of exoneration by DNA evidence. Mr. Gregory was the first inmate freed solely due to mitochondrial DNA testing, which was not available in 1992 when he was sentenced to 70 years in Jefferson County for rape and attempted rape of two women based on hairs in the mask used by the perpetrator. Mr. Gregory was represented by the *Innocence Project* in New York by Barry Scheck with Larry D. Simon as local counsel.

In reflecting on his plight, Mr. Gregory said, "Being in prison for something you didn't do was very hard. The stereotype that all black males are the same was used against me. I was devastated when this happened to me and I walked around like a Zombie in jail. This situation has made me aware of a lot of things." Gregory said racial bias was evident when his white fiancée took the stand during the trial in 1992, "everybody dropped their pen, everybody stopped listening and they did not hear anything else after that. When I went to prison, I felt all alone and I was angry because I was in a hole I couldn't get out of. But I got past that with the help of the national *Innocence Project*. There was hope. There are a lot of prisoners in prison, be patient with them, you all are their hope. Listen to them."


Larry Simon

Larry D. Simon said that defense attorneys have an awesome responsibility in representing the citizen-accused. "The outcome of William Gregory's case is powerful motivation for those of us who practice criminal defense. As Barry Scheck and Peter Neufeld have demonstrated in their efforts with the *Innocence Project* at the Cardoza Law School, innocent people are in prison today primarily due to lying jail house snitches, mistaken (especially cross-racial) identifications, and junk science like the hair analysis used in Mr. Gregory's

case. Our job as criminal defense lawyers is to make sure these categories of unreliable evidence are excluded from the trials of our clients. We can accomplish this by educating our judges and the public about the real reasons why innocent people are convicted."

Jefferson County Commonwealth attorney Dave Stengel asked that the charges be dismissed after he reviewed the DNA results, and was quoted in the July 6, 2000 *Lexington Herald Leader* saying the state, "has learned from this. And hopefully we can do better to make sure mistakes like these don't happen again."

William Gregory was released on July 5, 2000. Mr. Gregory's plight is a wake up call to defense attorneys who see little value in investigating and challenging forensic evidence or eyewitness identifications in cases with clients whose defense is innocence. It is also a wake up call to prosecutors, judges, and the public.

Department of Public Advocacy's Kentucky Innocence Project Begins

The Department of Public Advocacy (DPA) has responded to the public's concern about innocent people behind bars by creating the Department of Public Advocacy *Kentucky Innocence Project* (KIP) in the Spring of 2000. DPA's KIP assists those in Kentucky's prisons who declare their actual innocence and who have new evidence to support their innocence. DPA's KIP began taking requests for assistance from Kentucky inmates in September 2000 and has been contacted by over 250 prisoners. The Project is actively investigating 30 cases and continues to receive requests for assistance on an almost daily basis.

Public Advocate Ernie Lewis said the creation of DPA's KIP is one of the most exciting developments in Kentucky in the last few years. "We have had a Post-Conviction Branch in the Department for many years. That Branch has been litigating errors at the post-conviction level, sometimes resulting in the release of prisoners who had been wrongfully accused. However, the creation of the *Kentucky Innocence Project* has allowed the Post-Conviction Branch to join a nationwide movement that is focusing on the injustice that is corroding our criminal justice system. The advent of the technology of DNA with the national *Innocence Project* has created the right moment for this in Kentucky. The collaboration of the Department of Public Advocacy with Chase Law School, the University of Kentucky School of Law, and Eastern Kentucky University promises to bring this issue into prominence in our state, as well as to bring justice to many innocent inmates now sitting in Kentucky prisons."

Kentucky's DPA's KIP is modeled after successful programs such as the Innocence Project at Cardoza Law School under the direction of Barry Scheck, the Innocence Project Northwest at the University of Washington School of Law and the Center for Wrongful Convictions at Northwestern University. It utilizes volunteer students from Kentucky universities and law schools. Gordon Rahn of DPA's Eddyville post-conviction office is coordinating this DPA effort with the oversight of post-conviction branch manager, Marguerite Thomas and the direction of DPA Post-Trial Director Rebecca DiLoreto.

Rebecca DiLoreto

"Although the primary goal and impetus for the innocence projects is the post-conviction representation of innocent people, innocence projects have also contributed to fulfilling the need for practical legal education. Students in the projects have had the opportunity to learn by doing, under the supervision of attorneys and professors, as opposed to traditional learning in the classroom." Stiglitz, Brooks, Shulman, *The Hurricane Meets the Paper Chase; Innocence Projects New Emerging Role in Clinical Legal Education*, 38 Calif. Western L. Rev. 413, 415-416 (2002)

IOLTA Resources

The Kentucky Innocence Project has been the recipient of two IOLTA grants from the Kentucky Bar Association. The grants are utilized to cover expenses incurred by the volunteers and externs as part of the investigations and to pay for the expensive DNA testing required by some of the cases. The DNA testing in the Herman May case cost the *Kentucky Innocence Project* almost $7,000 (paid from the IOLTA grant funds) and KIP has another case that is presently in court requesting the release of evidence for DNA testing that will cost approximately $6,000.

UK College of Law and UK College of Social Work Partnership

Professor Roberta Harding led the way to establish a course at the University of Kentucky Law School that provides students with the knowledge, skills and opportunities to assist on cases. Students are required to attend a specially designed class and conduct an investigation on their assigned cases. The investigation is done under the supervision of Professor Harding and DPA's KIP personnel. The College of Social Work at the University of Kentucky, under the guidance of Professor Pamela Weeks, also had students volunteer to work on cases and provided valuable background information for not only their assigned cases but cases that UK law students were working on.

Chase College of Law Partnership

Chase College of Law at Northern Kentucky University established a similar program for the 2001-2002 academic year. Professor Mark Stavsky was instrumental in setting up the program at Chase. Professor Stavsky is on a sabbatical, but

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will continue to work with the project at Chase along with Professor Mark Godsey. Ten Chase students enrolled in the college's externship program for the 2002-2003 academic year and are presently investigating ten new cases.

Eastern Kentucky University
College of Justice and Safety

Eastern Kentucky University's College of Justice and Safety has joined the DPA *Kentucky Innocence Project's* efforts and four graduate students are actively involved in investigating cases. Two students are investigating an innocence claim and the other two students are teamed with law students from Chase College of Law. The four EKU students travel from Richmond to Chase College of Law at NKU every other Friday to participate in the classroom setting of the program. Professor Bill Nixon, an attorney and faculty member of the College of Justice and Safety, is the faculty sponsor for the EKU students.

The Selection Process for KIP

The selection process for the new cases to be assigned to the 2002-2003 student externs/volunteers will take place through the summer months. Criteria for consideration by KIP is substantial:

- Kentucky conviction and incarceration;
- Minimum 10 year sentence;
- Minimum of 3 years to parole eligibility OR if parole has been deferred, a minimum of 3 years to next appearance before the parole board; and
- New evidence discovered since conviction or that can be developed through investigation.

If an inmate's case satisfies all the four criteria, he or she is sent a detailed 20-page questionnaire for specific information about the case.

Larry Osborne in Whitley County

Tim Arnold

Larry Osborne was sentenced to death in 1999 following his conviction for the murder of two elderly victims in Whitley County, Ky. He was 17 at the time of the crime. The Kentucky Supreme Court reversed Osborne's conviction on April 26, 2001 based on its finding that the trial court allowed inadmissible hearsay testimony from a witness, Joe Reid. Reid died prior to the original trial and, therefore, could not face cross-examination during Osborne's first trial. At his re-trial in 2002, he was represented by Jim Norris, Gail Robinson and Tim Arnold. Osborne was acquitted on August 1, 2002 of all charges and set free. He spent over three years on Kentucky's death row. He became the 102nd death row person exonerated since 1973. One of his trial counsel, Gail Robinson, believes his wrongful conviction occurred because of the trial judge's ruling allowing the unreliable and false statement of a 15 year old witness who testified before the Grand Jury but died accidentally before trial. The reason there was such a false statement was misconduct by police and prosecutor intent on implicating someone, willing to ignore everything that indicated the accused was not guilty, and willing to coerce a false statement out of a 15 year old boy.

Gail Robinson

Jim Norris

Herman May in
Franklin County

In the early morning hours of May 22, 1988, Herman May's life changed forever. A young woman, a student at the University of Kentucky, was raped and sodomized in the back yard of a friend's house in Frankfort at approximately 3:00 a.m. Just over a month later, while on vacation in California, the young victim picked the picture of Herman May from a photo lineup and identified him as her attacker. May was convicted in October of 1989 of rape and sodomy and sentenced to concurrent 20 year sentences.

May was one of the first prisoners to contact the Department of Public Advocacy's *Kentucky Innocence Project* and request its help. A review of the questionnaire he submitted about specifics of his case raised a lot of red flags and his case was assigned a University of Kentucky law student for investigation. Almost immediately the red flags became glaring problems.

May's case involves some of the most common errors found in the wrongful conviction of innocent people. First, there was the identification issue. The initial description of the attacker was that he was thin, in his 20's, had long, stringy greasy dark brown hair and was wearing a blue cap. Two police officers testified about the description given within minutes of the attack. The investigating officer testified that the victim gave the same physical description at the hospital except noted that the attacker's hair was "chocolate brown." Herman May was 17 years old in May 1988 and had bright red hair.

Once May was identified as a suspect, the investigating detective flew to California and showed the victim a photo lineup that included May's picture. The victim first picked out three pictures and began a process of elimination that led to her identifying May as her attacker.

At trial there was also testimony about similarities between hair found on the victim and Herman May's hair. The forensic specialist testified that "…it was as good of a match as I have ever had."


Gordon Rahn

DPA's KIP's team of Marguerite Thomas, Gordon Rahn, Diana Queen, Chase College of Law Students Beth Albright and Debbie Davis and UK law student Chris Turner, however, continued to pursue the red flags. Based upon the victim's testimony at trial that she had not had consensual sex for several weeks prior to the rape, KIP requested the release of slides from the rape kit for DNA testing. The court granted the motion and DNA tests excluded Herman May as the donor of the semen.

Amazingly, what should have led to the release of Herman May from prison led to a new revelation from the victim—she had consensual sex within a "couple of days" of the rape. As a result, the Franklin Circuit Court ordered an additional battery of tests on other physical evidence and all of those test results were inconclusive. Still nothing matched Herman May.

On July 31, 2002 the court ordered additional testing. The hairs entered into evidence at trial were sent to a laboratory for mitochondrial DNA testing and on September 18, 2002, Herman May's life changed again. Franklin Circuit Court Judge Roger L. Crittenden received the lab report on the 18th and, after discussing the results with the lab technicians, entered an order that found that "…the results of the tests are of such decisive value or force…that it would probably change the result if a new trial should be granted."

Judge Crittenden's Franklin Circuit Court ordered the immediate release of Herman May from prison. The order was entered at approximately 2:00 p.m. CDT and at around 3:30 p.m. on September 18th, Herman May walked out of the Kentucky State Penitentiary and waited for his parents to take him home. Herman May today is adjusting to his new life and catching up on 13 years he missed with his family.

Robert Coleman in Bullitt County

Mistaken eyewitness identification, bad defense lawyering, and false witness testimony led to the conviction of an innocent man in Shepherdsville, Kentucky. In March 1998, a Bullitt County jury found Coleman guilty of first degree rape and terroristic threatening. He was sentenced to ten years imprisonment. The only evidence against Coleman at trial was the word of his accuser whose story changed dramatically each of the four times she told it under oath. Unfortunately, Coleman's trial attorney did nothing to point out the inconsistencies in the accuser's testimony to the jury. The trial attorney also failed to call to the stand an alibi witness - Coleman's employer who could have testified that Coleman was at work at the time the alleged assailant dropped off Coleman's accuser. Coleman was the only witness who testified for the defense. Furthermore, Coleman's trial attorney had represented Coleman's accuser on a charge of DUI 3rd only two months prior to undertaking Coleman's case. No waiver of the conflict of interest was ever obtained and no mention of the accuser's possible alcohol intoxication was ever made at the trial despite the fact that the accuser had been at a bar for several hours prior to the alleged attack.

The Bullitt County Circuit Court held an evidentiary hearing in the case in March 2002. The trial attorney, a retired police detective, Coleman's employer and Coleman himself testified at the hearing. Initially, the Judge in the case denied Coleman's RCr 11.42 after the hearing. On further consideration by the Judge, however, the Judge determined that Coleman did in fact receive ineffective assistance of counsel at the trial level. He further held that if Coleman would have been given a fair trial, there is a reasonable probability that the result of his trial would have been different. Therefore, the Judge granted Coleman's motion for a new trial. Presently, Coleman is out of jail on bond awaiting his new trial. He continues to adamantly maintain his innocence and looks forward to the opportunity to officially clear his name.

The September 17, 2002 Order of Judge Thomas L. Waller stated in part, "Since the entry of this Court's Orders on August 14, 2002, and August 23, 2002, and on further reflection and the Court being of the belief that one should admit one's mistakes, the Court believes that the evidence provided by the Defendant in the RCr 11.42 Hearing is sufficient to justify a new trial…. Believing that the defendant did not receive a fair trial and that there is a reasonable probability that the result of his trial would have been different had trial counsel proceeded as herein set out, the Court grants the Defendant's Motion for a new trial."

Why Are There Wrongful Convictions?

DNA testing and challenges of the *Innocence Project* at Cardoza Law School led by Barry Scheck and Peter Neufeld have demonstrated there are in prison those that are innocent. National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%. In Kentucky that could mean between 650 and 1650 inmates serving time for crimes that they did not commit. Scheck and Neufeld in their book, *Actual Innocence* (2000), list the factors they found led to wrongful convictions:

1) Mistaken eyewitness identification;
2) Improper forensic inclusion;
3) Police and prosecutor misconduct;
4) Defective and fraudulent science;
5) Unreliable hair comparison;
6) Bad defense lawyering;
7) False witness testimony;
8) Untruthful informants;
9) False confessions.

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Race plays a role in this process. Scheck and Neufeld reported in *Actual Innocence* that the race of the exonerated defendants was: 29% Caucasian; 11% Latino; and 59% African American.

George F. Will in an April 6, 2000 Washington Post review of *Actual Innocence* recognized the importance of wrongly convicting the innocent and the affect of *Actual Innocence* when he said, "It should change the argument about capital punishment...You will not soon read a more frightening book... Heartbreaking and infuriating." The Sunday, Sept. 15, 2000 *Boston Globe* said of *Actual Innocence*, "One of the most influential books of the year...shocking…compelling…an objective reference for partisans of all stripes."

Americans want the wrongly convicted to be able to prove their innocence with scientific testing. A Gallup poll, conducted March 17-19, 2000 finds "that 92% of Americans say those convicted before the technology was available should be given the opportunity to submit to DNA tests now — on the chance those tests might show their innocence. Support for this position runs solidly across all demographic groups, as well as all political ideologies…. Mark Gillespie, "Americans Favor DNA 'Second Chance' Testing for Convicts: Nine in ten Americans support genetic testing to resolve long-held claims of innocence," GALLUP NEWS SERVICE.

Kentucky General Assembly Action

Compensation to the Wrongly Convicted Innocent. The last two Kentucky General Assemblies have had bills introduced in both the Senate and House to provide for a method of determining reasonable compensation to those innocent persons wrongfully incarcerated in Kentucky either through a civil action in the circuit court or an action in the Board of Claims.

In 2002, House Bill 699 http://www.lrc.state.ky.us/record/02rs/HB699/bill.doc was introduced by Representative Robin Webb and co-sponsored by Representatives Jesse Crenshaw, Paul Bather and Reginald Meeks. Senate Bill 93 http://www.lrc.state.ky.us/record/02rs/SB93/bill.doc was introduced by Senator Gerald Neal, and co-sponsored by Senators Walter Blevins, David Boswell, Paul Herron Jr., Ray Jones II, David Karem, Marshall Long, Dan Mongiardo, R.J. Palmer II, Joey Pendleton, and Ernesto Scorsone. Both bills apply to those convicted of a felony or capital offense after January 1, 1980 and exclude those who had pled guilty. Both bills provide for compensation to include fines, court costs, and reasonable attorney fees. HB 699 provided for relief in either the Board of Claims of $20,000 for each year of wrongful conviction up to a maximum of $250,000 or in circuit court of an amount as determined by the evidence. SB 93 provided for $25,000 per year of wrongful incarceration. The bills were not called for a vote in either the House or Senate Judiciary Committee.

At the November 19, 2002 Interim Joint Judiciary Committee meeting, Senator Neal presented on a draft of a bill to provide compensation to those wrongfully convicted. Sitting at his side were Dave Stengal, former President of the Commonwealth Attorney Association and Ernie Lewis, Kentucky's Public Advocate. Senator Neal identified Mr. Gregory as a victim who had 8 years of his life wrongfully snatched away. "Our justice system has been brought into question when we… incarcerate someone… but we found we made a mistake… and then too often we do nothing about it." Senator Neal said that he did not think Mr. Gregory can be made whole but he said we could make some attempt to acknowledge and moderate the impact of the injustice. He also said that the avenue for relief was best in the Board of Claims so there is no re-victimization and so the prosecutor is not put on trial.

Jefferson County Commonwealth Attorney and former President of the Commonwealth Attorneys Association David Stengal said, "the Commonwealth Attorneys Association last year supported this bill" and supports it this year. The prosecutors do not want the bill to provide an avenue of relief that puts it into an adversarial proceeding so prefer the Board of Claims as the venue. Stengal said "the last thing any prosecutor ever wants to do is to put an innocent person in the penitentiary and we think this bill might do something if that awful occasion were to occur this bill could help remedy that." Public Advocate Ernie Lewis expressed appreciation for not forgetting the innocent who have been wrongfully convicted and who have served time in prison. He said the bill is consistent with what we know nationally and with the civil system where wrongs are compensated in a reasonable manner. He said that the $25,000 amount was meager compared to 365 days of liberty being taken from a citizen. Lewis expressed a concern that the bill draft excluded those who pled guilty when we know that nationwide people who are innocent plead guilty, especially the mentally retarded. Lewis hopes that Senator Neal and the Committee will consider that reality.

DNA Evidence. The 2002 Kentucky General Assembly did pass a significant DNA evidence bill, House Bill 4. This is a significant piece of legislation that both expands the DNA database and ensures that samples are preserved. Among its provisions set out in KRS Chapter 17 are the following:

Persons already sentenced to death may request DNA testing and analysis of an item that may contain biological evidence related to the investigation or prosecution. The Court must order testing and analysis if a reasonable probability exists that the person would not have been prosecuted if results of testing had been exculpatory, and if the evidence can still be tested and was not previously tested. The Court may order testing and analysis if a reasonable probability exists that the person's verdict or sentence would have been more favorable with the results of the DNA or that the results will be exculpatory. If the Court orders testing and analysis, appointment of counsel is mandatory. If the sample has been previously tested, both sides must turn over underlying data and lab notes. Once a request is made, the Court must order

the Commonwealth to preserve all samples that may be subject to testing. If the results are not favorable to the person, the request or petition must be dismissed. If the results are favorable, "notwithstanding any other provision of law that would bar a hearing as untimely," the Court must order a hearing and "make any further orders that are required."

When a person is accused of a capital offense, either the Commonwealth or the defense may move for a sample to be subject to DNA testing and analysis. The testing is to be done at a KSP laboratory or a laboratory selected by the KSP. Up to 5 items may be tested with the costs to be borne presumably by the lab; testing of additional items "shall be borne by the agency or person requesting the testing and analysis."

The DNA database is expanded to include persons convicted of or attempting to commit unlawful transaction with a minor in the first degree, use of a minor in a sexual performance, promoting a sexual performance by a minor, burglary in the first degree, burglary in the second degree, and all juveniles adjudicated delinquent for these offenses. The database is also expanded for all persons convicted of capital offenses, Class A felonies, and Class B felonies involving "the death of the victim or serious physical injury to the victim."

Items of evidence that may be subject to DNA testing may not be disposed of prior to trial unless the prosecution demonstrates that the defendant will not be tried, and a hearing has been held in which the defendant and prosecution both have an opportunity to be heard.

Items of evidence that may be subject to DNA testing may not be disposed of following a trial unless the evidence has been tested and analyzed and presented at the trial, or if not introduced at trial an adversarial hearing has been held, or unless the defendant was found not guilty or the charges were dismissed after jeopardy attached and an adversarial hearing was conducted. The burden of proof for the destruction of samples will be upon the party making the motion.

Destruction of evidence in violation of this statute is a violation of the tampering with physical evidence statute (KRS 524.100). Evidence must be retained "for the period of time that any person remains incarcerated in connection with the case" unless there has been a hearing and an order to destroy the evidence.

The statute was effective on July 15, 2002. However, an elaborate implementation date mechanism is included in the statute that allows expansion of the database, as funding becomes available.

Kentucky Supreme Court

Proposals were made to the Kentucky Supreme Court to change its Rules of Criminal Procedure to reflect the concerns of the public and to provide for improved procedures to lessen the chance of wrongful convictions of the innocent.

Requests were made to provide instructions to jurors in cases where there is eyewitness identification or an informant to require jurors to assess that testimony carefully. The testimony of informants and eyewitnesses is used in criminal cases and not unusually in the most serious and highly publicized criminal cases where the stakes are high and pressures are great. Informants and eyewitnesses play an important role for law enforcement. We know from the DNA cases nationally and in Kentucky that incorrect eyewitness investigations and untruthful informant testimony contribute to wrongful convictions. The proposed rule providing for an instruction in each of these areas would be one step in providing increased protections for citizens who are presumed innocent. The Court declined to make these changes.

Under current Kentucky law, it is difficult or impossible in some instances to obtain post-conviction DNA testing to take advantage of these advances because of the time limits on requesting post-conviction relief. Presently, there is a 3-year standard under RCr 11.42(10) and 1 year under RCr 10.06(1) or more "if the court for good cause permits." The law's limitation which is intended to prevent the use of evidence that has become less reliable over time results in precluding DNA testing that remains highly reliable for decades after a trial.

The National Commission on the Future of DNA Evidence, a federal panel established by the U.S. Department of Justice and comprised of law enforcement, judicial, and scientific experts, has urged that post-conviction DNA testing be permitted in the relatively small number of cases in which it is appropriate, notwithstanding procedural prohibitions and notwithstanding the inmate's inability to pay. This nationally recommended procedure was proposed to the Kentucky Supreme Court for all clients, not just capital cases.

While House Bill 4 passed in 2002 addresses some of these concerns, it is limited to capital cases. The proposal made to the Court would have created a new rule, RCr 11.43, and provided improved procedures for all persons convicted in Kentucky, not just capital clients. The Court declined to adopt this procedure. Only Justices Janet Stumbo and James Keller voted to adopt proposed RCr 11.43 which sets forth a procedure for obtaining post-conviction DNA testing.

Kentucky Criminal Justice Council

The Council has provided a focus to study significant policy issues and provide considered review and recommendations from a variety of criminal justice perspectives. Their recommendations have included proposals for legislation that is meant to reduce wrongful stops, arrests and convictions. For instance, it proposed a Racial Profiling Policy and Legislation that is now law. KRS 15A.195. The Law Enforcement Committee is currently studying ways to improve investigation when eyewitness identifications are involved. The Council proposed to the 2002 General Assembly a study of the administration of the death penalty in Kentucky. The General

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Assembly refused to fund that request. The Council was instrumental in the passage of the DNA legislation.

Kentucky Editorials

The *Lexington Herald Leader* said upon May's release in a September 21, 2002 editorial: "At a time when we are under pressure to surrender civil liberties in the name of security, we all should take Herman May's story to heart. When things already can go so horribly wrong, even with the protections afforded the accused, what will happen if we surrender due process rights? More innocent people will be jailed. The justice system that's the bedrock of American liberty could crumble. As for May, we're sorry the state of Kentucky doesn't compensate those it wrongly imprisons. It should, even if it'd difficult to put a price on what he lost."

In an August 7, 2002 editorial about Osborne's acquittal, the *Courier Journal* said, "The dangers of mistakes are too great, and the chance of putting an innocent person to death in the people's name is one that should never be risked."

In its August 29, 2000 editorial, the *Lexington Herald Leader* applauded the efforts to create a *Kentucky Innocence Project* but called for answers to remaining questions, "What do we make of a justice system that wrongly imprisons a man for seven years? Where are the cracks in the system? How do we seal them?"

Barry Scheck and Marguerite Thomas

KBA and Barry Scheck

Barry Scheck spoke at the June 2002 KBA Convention and called Kentucky policy makers to address needed reforms, especially an Innocence Commission to investigate what went wrong in the wrongful convictions. He also called for compensation to persons wrongly convicted. *The Innocence Project* at the Benjamin N. Cardozo School of Law at http://www.innocenceproject.org/index.php sets out a summary of recommended reforms.

Mistaken ID. In 1999, the National Institute of Justice (DOJ) issued a report entitled Eyewitness Evidence: A Guide for Law Enforcement that outlined several methods for minimizing mistaken eyewitness identification when collecting evidence. Policy and practice changes that should be adopted by police departments and other investigating agencies include:

- Videotaping of all stages of the identification process, whether by lineup, photograph, composite, etc.
- Lineups and photo spreads should be administered by an independent identification examiner. The suspect should not be known to the examiner to ensure that the witness is not influenced or steered toward an identification.
- Witnesses should be informed before any identification process that the actual perpetrator may not be in the lineup or the perpetrator's picture may not be included in the photo spread.
- Sequential presentation of lineups or photo spreads should be used rather than the usual simultaneous presentation method, thus preventing relative judgements and forcing witnesses to truly examine their own identifications.
- Show-up identification procedures should be avoided except in the rare circumstance that the suspect is apprehended in the immediate vicinity and within a very short amount of time of the crime.
- Witnesses should be asked to rate their certainty at every instance of identification.
- Police and prosecutors should be trained with regard to the risks of providing corroborating details that may disguise any doubts a witness may have.

Police and Prosecutorial Misconduct. Improper techniques, coercive tactics, and poor investigation have all contributed to wrongful convictions. A prime example of improper police techniques is suggestive identification procedures employed by many police departments. One on one show-ups, suggestive line-ups, and coerced identifications have often placed the wrong person in jail. Forced confessions, violence toward suspects, manufactured evidence — all of these have had both obvious and subtle effects upon the lives of many unjustly accused and convicted persons.

Overzealous and untruthful prosecutors have also been causes of wrongful conviction. Examples of prosecutorial misconduct include suppression of exculpatory evidence, destruction of evidence, the use of unreliable and untruthful witnesses and snitches, and fabrication of evidence.

> Police officers and prosecutors need to be trained to avoid and held accountable for utilizing improper techniques of securing convictions. One step toward this goal would be the creation of disciplinary committees that focus exclusively on misconduct of police officers and prosecutors.
>
> Additionally, the further involvement of federal agencies is needed to address misconduct by state police officers.

False Confessions. In a surprising and disturbing number of DNA exoneration cases, the defendants had made incrimi-

nating statements or delivered outright confessions. Many factors arise from interrogation that may lead to false confession, including: duress, coercion, intoxication, diminished capacity, ignorance of the law, and mental impairment. Fear of violence (threatened or performed) and threats of extreme sentences have also led innocent people to confess to crimes they did not perpetrate.

> All interrogations should be videotaped, thereby providing an objective record. This is not only feasible, it has been made law throughout the United Kingdom and Alaska.

Additional reforms have been suggested by Governor Ryan's Commission on Capital Punishment. Only two states, Alaska and Minnesota, currently mandate the taping of interrogations. This common sense reform would help police minimize the occurrence of false confessions, which also means greater chances that the actual perpetrator is not free to commit more crimes.

Poor Defense Lawyering. Mirroring prosecutorial misconduct, ineffective or incompetent defense counsel have allowed men and women who might otherwise have been proven innocent at trial to be sent to prison. Failure to investigate, failure to call witnesses, inability to prepare for trial (due to caseload or incompetence), are a few examples of poor lawyering. The shrinking funding and access to resources for public defenders and court appointed attorneys is only exacerbating the problem. The ACLU has filed a class action law suit against Montana's indigent defense system for failing to meet the national standards of indigent defense.

Some suggestions that would help remedy the problem of bad lawyering:

- Ensuring adequate pay for public defenders and competitive fees for court appointed attorneys would attract competent attorneys to staff these offices and take cases. Public defenders and prosecutors in any given area should receive commensurate pay.
- Caseloads for public defenders should never exceed the standards of the National Legal Aid and Defenders Association. If attorneys are forced to proceed with too many cases, ethical complaints should be lodged with the appropriate state bar.
- Every jurisdiction should establish standards of adequate defense. The public should be informed and educated about the requirements of an adequate defense. Standards would also provide notice to all defense attorneys of how much work is expected of them.
- Federal funds for defense services should be relative to the amount of funding provided to prosecutors' offices in any given jurisdiction.

Junk Science. As finders of fact in a trial, the ultimate determination of truth is up to the jury. In twenty-five of the first eighty-two DNA exonerations, scientists and prosecutors presented bad or tainted evidence to the judge or jury. In these cases, it was fortunate that DNA testing could ultimately expose the truth. Examples of junk science include: experts testifying about tests that were never conducted, suppression of evidence and/or exculpatory results of testing, falsified results, falsified credentials, misinterpretation of test results, and statistical exaggeration. The following suggestions, once implemented, would limit or eliminate the phenomenon of junk science being presented in courtrooms.

- The scientific bases for forensic testing of all kinds must be reexamined in an objective manner. These evaluations should follow the standards put forth by the Supreme Court in recent cases, which are specifically designed to keep junk science out of the courtroom.
- All crime laboratories should be subject to the same or better standards of professional organizations, like all medical laboratories. Regulatory oversight agencies, like New York's Forensic Science Review Commission, should be created and given the authority to regulate the practices of laboratories as well as set standards for the use of private laboratories or other outsourcing. These agencies or commissions should be comprised of scientists, prosecutors, defense attorneys, judges, and laboratory directors.
- All crime laboratories must be reviewed. Accreditation standards should include rigorous quality control, spot-checking, quality assurance reviews, and periodic inspection by a regulatory body.
- Laboratories should be submitted to proficiency testing, including blind proficiency testing. Laboratories should subsequently be rated on their performance and ability to provide valid data.
- Microscopic hair comparisons should give way to mitochondrial DNA testing.
- Information regarding controls must be presented at trial, whether or not they failed in the instant case, as well as error rates for any given testing procedure.
- Defense attorneys should have relevant scientific evidence and results independently examined and/or re-tested. Public defenders and court appointed attorneys must receive funds to retain said experts.
- Every public defender and prosecutor's office should have on staff at least one attorney acting as a full time forensic expert.
- Forensics experts and crime laboratory directors should formally agree that crime laboratories should act as independent entities within the criminal justice system. They would, thereby, be released from pressure from the pros-

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ecution and defense. These laboratories should be staffed by professionals who can present data objectively, without regard for either the prosecution or defense.

- Crime laboratory budgets should not be linked, in any way, to the fiduciary process of any police agency. Police agencies should not be allowed to exercise supervisory responsibility of the crime laboratory or its employees.
- Complete discovery of all data from forensic tests should be provided in all criminal cases to all parties involved. Reports should include explanations of the testing involved, not just the results of said procedure. All potentially exculpatory inferences drawn from any testing should also be disclosed.
- Protection should be extended to "whistle blowers" in any crime laboratory who have concerns about the reliability of testing or results. Experienced expert personnel should be available to settle disputes among scientists.
- State and local governments should establish an office for an independent reviewer who is authorized to investigate allegations of misconduct in crime laboratories. The federal government provided a good example in the case of the investigation of FBI laboratories.
- Law and medical schools should sponsor the creation of postgraduate forensic science programs and degrees.

The use of jailhouse informants, especially in return for deals, special treatment, or the dropping of charges, has proven to be a specious form of evidence, as has testimony that has only appeared after rewards were offered. Often, the testimony of these snitches and informants has been the key in sending an innocent man or woman to prison for a crime he or she did not commit. In Canada, after the exoneration of Guy Paul Morin, a commission was established to review the causes of his conviction and propose remedies for similar situations. The Commission's findings can be downloaded at www.attorneygeneral.jus.gov.on.ca/html/MORIN/morin.htm. Please also see www.gov.mb.ca/justice/sophonow.

In general, these guidelines would allow the finder of fact to more evenly weigh the probative value of an informant's testimony:

- Judges should presume, and instruct the jury, that a jailhouse informant's testimony is unreliable. Moreover, the prosecution should be required to overcome that presumption before the jury even hears said testimony.
- Any deal or reward offered or accepted with regard to informants or snitches must be in writing. All verbal communication should be videotaped.

Limits of Conventional Serology. Prior to the introduction of DNA testing into the criminal justice system, forensic scientists were limited to the use of conventional serology. By conventional serology, we mean International ABO Blood Typing, enzyme testing (e.g. PGM, ESD), secretor status testing, microscopic hair analysis, presumptive chemical screening (acid phosphatase, P30, amylase), and visualization methods like "christmas tree" staining.

International ABO Blood Type

This form of testing is familiar to most lay people, as it yields blood types, i.e. A, AB, B, and O. By itself, ABO blood typing is not very probative, as inclusion rates vary between 5% and 40% of the population.

Coupled with enzyme testing, ABO typing is more probative, but nowhere near as probative or discriminating as DNA testing. The enzymes in question are also referred to as blood group markers and have acronyms like PGM (phoshoglutomase).

Secretor status also has to be factored in to any analysis by conventional serology. People whose blood group antigens can be found in other bodily fluids like saliva and semen are called secretors. Blood group antigens allow a forensic scientist to determine the blood type of a person by testing other fluids. 75% - 85% of the population are secretors.

Chemical Screening and Visualization Techniques

Presumptive chemical screening allows forensic scientists to determine whether or not certain bodily fluids have been deposited on an item. There are presumptive indicators for blood, semen (acid phosphatase, P30), and saliva (amylase). Acid phosphatase, for example, is found in varying proportions in many body fluids, but is especially concentrated in semen. "Christmas tree" staining is a method of visualizing spermatozoa. Chemicals are added to a semen stain that turn any spermatozoa present red and green, thus making it easier to visualize them under a microscope.

Before the advent of mitochondrial DNA testing, hair was examined with the use of a microscope. Forensic scientists examined hair for similar and varying characteristics. This practice is highly subjective and very inaccurate with regard to including or "matching" a suspect. Quite often, hair analysis has determined the outcome of a trial due to overblown statistics or where the probative value of microscopic hair analysis was exaggerated.

DNA. The use of forensic DNA testing has brought about many changes in the criminal justice system. DNA testing is now being used routinely to convict and clear those awaiting trial. If performed correctly, DNA testing becomes a powerful and impartial tool, able to correctly identify any perpetrator in crimes where there is relevant biological evidence. As the technology advances and is applied in appropriate cases before trial, the chances of convicting an innocent person, at

least where identity can be proven through biological evidence, is greatly diminished.

In 1999, the Department of Justice released a report entitled Postconviction DNA Testing: Recommendations for Handling Requests. Written by judges, prosecutors, defense lawyers, and victims' advocates, these guidelines provide a model that will help to insure that only the guilty are prosecuted and convicted.

Conclusion

"This is the tip of the iceberg indicating fundamental problems with the criminal justice system**, "**Public Advocate Ernie Lewis said commenting on the four Kentucky wrongful conviction cases. "National estimates put the number of innocent people incarcerated in the nation's prisons between 4%-10%. Our system must ensure that guilty people and only guilty people are punished. It is not adequately doing that. William Gregory in Louisville, the 17 year old Larry Osborne in Whitley County, the 17 year old Herman May in Frankfort and Robert Coleman in Bullitt County prove what we feared—we have serious problems across Kentucky with mistaken eyewitness identification, cross-racial identification, bad forensic evidence, overzealous prosecution, poor lawyering – and innocent Kentucky citizens are being wrongly convicted. We must ensure that before liberty is taken from a fellow citizen that someone is guilty. There are serious problems with our justice system in Kentucky that can only be solved with adequate resources for our public defender system. Kentucky has made great strides in the last 6 years, but heavy caseloads for public defenders threaten a return to the time when we cannot guarantee to the public the reliability of the verdicts in cases in which public defenders are involved. The Department of Public Advocacy's *Kentucky Innocence Project* with DPA, the University of Kentucky Law School and School of Social Work**,** Eastern Kentucky University College of Justice and Safety, and Chase College of Law working in partnership is revealing the iceberg."

Kentucky has begun to respond to the public's call for procedures to insure the innocent are not convicted and to insure the release of those in prison who are innocent. Some of the beginning responses are significant. But much more work must be done to honor our deep felt value that our liberty and life must not be taken if we are innocent. ■

Longtime Defender Hugh Convery Retires

Hugh Convery

At the end of December 2002, long-time Director of DPA's Morehead Office, Hugh Convery, will be retiring. At the DPA Quarterly Leadership Education Program on December 3, 2002, Hugh was presented with a *Distinguished Service Award* for "[O]utstanding public defender service to the Courts and people of Bath, Carter, Elliott, Greenup, Menifee, Montgomery, Morgan and Rowan Counties." Hugh has been with the Department as director of the Morehead Office since December 1988. At the presentation, Public Advocate Ernie Lewis, Trial Division Director David Mejia and Eastern Regional Manager Roger Gibbs spoke of Hugh's excellent leadership and wealth of knowledge. Hugh has shown himself to be the best both to his employees and to the public he served.
A hallmark of Hugh's service and example of his great advocacy was that in June of 1995, after having heart surgery and just being released from the hospital, Hugh insisted on representing a young juvenile charged with shooting a teacher and janitor in a highly publicized death penalty case. After a month long jury trial, Hugh achieved a non-death sentence for his client.

Hugh is more than a supervisor to his employees - he is a friend and a mentor, always directing them toward greater achievements. Hugh, we wish you the best! You will be missed. ■

In Memory of Jim Early

James R. Early, born January 8, 1944, age 58, passed away November 16, 2002, after a courageous battle with cancer. Born in Lynchburg, VA; 1962 graduate of Ashland High School, Vietnam Veteran, graduate of UK School of Law in 1973. Served as assistant public defender in the state office in Frankfort from 1974 until 1977. Public Advocate Ernie Lewis remembers, "I have a vivid memory of Jim Early going all over Kentucky trying some of the most difficult cases that there were. He was a fearless advocate who was zealous in his representation of Kentucky's indigent accused. Jim also had a delightful sense of humor that allowed him to stay positive despite the darkest of circumstances. Jim was a wonderful early model for Kentucky public defenders." Deputy Public Advocate Ed Monahan, who was a law clerk for Jim Early in 1975, remembered Jim's pleasant, focused, effective representation of clients, "I learned a lot from working with Jim on major trials in Jefferson and Clay counties. He represented clients so very well. I remember as a law clerk researching the issue of a trial judge's refusal to allow a closing argument in a case he was doing on appeal. Those were the days. We miss Jim." ■

Prosecutorial Misconduct in Capital Cases in the Commonwealth of Kentucky: A Research Study (1976-2000)

Study's Key Finding

During the period under review, there was evidence of prosecutorial misconduct in 26 (47.3%) cases; nearly one-half of the 55 qualifying cases and a total of 55 instances of prosecutorial misconduct, thus an average of 2.11 (55/26) instances of prosecutorial misconduct occurred in each case involving prosecutorial misfeasance.

I. Introduction

Among its sovereign peers, the United States is the only country that continues to consider judicial execution a viable penalty for ordinary crimes as distinct from exceptional crimes such as war crimes and crimes against humanity. Presently, thirty-eight (38) states, the federal government and the United States military sanction capital punishment. One consequence of this practice is the production of a myriad of disturbing legal, moral, ethical, social, economic and related issues. Specifically, these issues include, but are not limited to, the possibility of the conviction and execution of the innocent, the insidious roles played by race, class and gender in the capital litigation process, coupled with the inefficaciousness of due process in combating the recurring problem of prosecutorial misconduct during the guilt and/or penalty phase of the trial of a capital case. It is against this background of the tremendous power and control that the American prosecutor wields over a defendant's life, liberty, and reputation and the reprehensible nature of prosecutorial misconduct that this study was undertaken.

It is a travesty of justice and a moral outrage whenever a defendant is convicted of a capital offense when prosecutorial misconduct occurred. This inevitably leads to an erosion of public confidence in the justice system. Hence, the compelling need for a constant monitoring of the judicial process and more especially for scholarly investigations of prosecutorial misconduct in death penalty cases, taking into account the paucity of social science and legal researches on this issue. Such scholarly responses are also justified on the additional grounds that it is, unquestionably, the professional expectation among lawyers and judges that a prosecutor's preeminent obligation is that of a "minister of justice"[1] which obliges him/her to seek justice for all the parties (a key dimension of which is the vindication of the innocent at all costs) and also to guarantee the defendant's right of due process in capital cases, now elevated to the level of "super due process" by the United States Supreme Court *(Woodson v. North Carolina).*[2] Accordingly, where prosecutorial conduct falls far short of this expectation there arises a compelling need for professional accountability and censure.

Two further justifications for the study are: (1) the extremely topical and controversial national debate on the death penalty and the increasing possibility of wrongful capital convictions for murder leading to the execution of innocent persons, and (2) the constantly expanding nature of the prosecutor's authority within the American criminal justice system (Gershman, 2000: vii) without any adequate and ef-

fective safeguards against abuse or misuse. Webster taught that justice is mankind's greatest interest on earth. The utilitarian school led by Mill and Bentham gave us the legacy of the principle of liberty. Based on these juridical legacies, it is our submission that it should be a major preoccupation of the leading democracy in the world to seek to repress any trend in the exercise of governmental authority of a systemic nature that may amount to a travesty of justice. It is within this general conceptual and legal framework that the deleterious impact of prosecutorial misconduct in the American criminal justice system, or any criminal justice system for that matter, today should be understood and addressed.

In the context of the administration of criminal justice in the U.S. today, prosecutorial misconduct has assumed epidemic proportions. Despite the admonition of the U.S. Supreme Court that prosecutorial wrongdoing may be grounds for criminal liability as well as disbarment *(Imbler v. Pachtman)*,[3] a study published in the *Chicago Tribune* on January 10, 1999 found that nationwide, since 1963, three hundred and eighty-one (381) homicide cases were reversed because prosecutors concealed evidence negating guilt and knowingly presented false evidence. Of those 381 defendants, 67 were sentenced to death, and of the 67, nearly half were later released. None of the prosecutors in those cases faced criminal charges or disbarment (Anderson, 1999: 2). To the same effect was a finding from a study done by *Amnesty International* in 1998, which documented numerous capital cases in the state of Texas where prosecutors were guilty of concealing evidence favorable to the defendant from defense attorneys "in contravention of their legal and ethical obligations" under the *Brady* doctrine,[4] and of engaging in improper argument to the capital jurors.

Significantly, judicial decisions in Kentucky dating back to 1931, notably *Jackson v. Commonwealth*,[5] *Goff v. Commonwealth*,[6] *King v. Commonwealth*,[7] and *Stasell v. Commonwealth*[8] had determined that prosecutors had engaged in improper arguments to capital juries especially urging them to impose the death penalty in cases because the "community demands it."

Recently, the most far-reaching study to date of the death penalty in the United States covering appeals in all capital cases from 1973-1995 conducted by a team of lawyers and criminologists found that 2 out of 3 convictions were overturned on appeal mostly because of serious errors by, amongst others, overzealous police *and prosecutors who withheld evidence* (Liebman, Fagan & West, June 12, 2000).

...it should be a major preoccupation of the leading democracy in the world to seek to repress any trend in the exercise of governmental authority of a systemic nature that may amount to a travesty of justice.

Their central findings included the following:

- Nationally, during the 23-year study period, *the overall rate of prejudicial error in American capital punishment was 68%*, that is to say, the courts found serious, reversible errors in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period.
- To lead to reversal, error must be serious, indeed. The most common errors prompting a *majority of reversals* at the state post-conviction stage include mainly *police or prosecutorial misconduct in the form of suppression of evidence favorable to the defendants and essentially of an exculpatory nature.*
- High errors put many individuals at risk of wrongful execution: 82% of the people whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve sentences *less than death* when the errors were cured at retrial; 7% *were found to be innocent of the capital crime.*

These are very revealing disclosures that clearly indicate both the prominence of prosecutorial misconduct in death penalty cases in the United States and its disconcerting frequency.

II. Key Finding

Our study's primary and most critical finding is that:

> During the period under review, there was evidence of prosecutorial misconduct in 26 (47.3%) cases; nearly one-half of the 55 qualifying cases and a total of 55 instances of prosecutorial misconduct, thus an average of 2.11 (55/26) instances of prosecutorial misconduct occurred in each case involving prosecutorial misfeasance.

III. The Study: Conceptual and Legal Context

The problem of prosecutorial misconduct in capital cases in Kentucky was initially put in its theoretical perspective by addressing the role of the prosecutor in a combined conceptual and legal context in order to establish the normative baselines against which prosecutorial misconduct was being measured and evaluated. This approach involved a two-phase analysis of: (1) the prosecutorial role (internationally, comparatively, nationally, and locally), and (2) definitions and contours of prosecutorial misconduct and its implications for the rule of law and human rights. This part of the report embodies these insights into the prosecutorial function.

A. Introduction

In nearly all-major criminal justice systems of the world, the prosecutor plays a tremendously important and critical role. Commensurate with this role are obligations and responsibilities of considerable magnitude and implications for the rights and freedoms of individuals who as defendants come

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under the jurisdiction of the courts in every major criminal justice system. Regardless of which principle (expediency, opportunity, or legality) actually motivates prosecutorial action or decision-making, the role of the prosecutor revolves around the exercise of discretionary powers (Fionda, 1995: 8-9). Though the exercise of prosecutorial discretion is not unique to the American criminal justice system, nowhere else in the world has the exercise of prosecutorial discretion become a subject of intense public debate and scholarly criticism in contemporary times than in the United States, the world's leading democracy.

Academics, professionals and lay people have come to acknowledge not only the considerable nature of prosecutorial discretion in almost every phase of the criminal justice process in the U.S.; but also the far-reaching implications of its abuse or wrongful exercise. A major area where these are manifest is that of the prosecution of death penalty cases. Since a capital sentence is the "ultimate punishment," it is from this standpoint that the phenomenon of prosecutorial misconduct can be perceived as having had its most disturbing and troubling impact. Hence, the focus of our study: the prevalence of prosecutorial misconduct during the guilt or penalty phase of capital cases in Kentucky during the period 1976 to 2000.

B. The Prosecutorial Role: Internationally, Comparatively, Nationally, and Locally

From a general international legal perspective, the important position that the prosecutor occupies as a principal player in promoting and encouraging respect for human rights and fundamental freedoms can be deduced from the guidelines promulgated in 1990 by the United Nations at its Eighth Congress on the Prevention of Crime and Treatment of Offenders. Underscoring the centrality of the prosecutorial function they depict it as a crucial role in the administration of justice. Several provisions explicitly and emphatically reflect the threefold tenet (whether the criminal proceeding is non-capital or one where the defendant has the risk of having "the ultimate penalty" imposed) that it is the obligation of the prosecutor: (a) to act in accordance with the law, fairly, consistently and expeditiously, and to, respect, protect and uphold human rights; (b) to refrain from using illegally obtained evidence or evidence of a grossly prejudicial nature against defendants; and (c) to act fairly and impartially throughout both the trial and sentencing phases of a criminal case. In essence, there is international acknowledgement that the supreme obligation of the prosecutor in a criminal case is to convict the guilty and vindicate the innocent. A logical corollary of this international recognition of the prosecutorial function is, in the authors' opinion, that violations of their ethical duties by prosecutors constitute grave threats to the protection and enforcement of human rights.

...since 1963, three hundred and eighty-one (381) homicide cases were reversed because prosecutors concealed evidence negating guilt and knowingly presented false evidence. Of those 381 defendants, 67 were sentenced to death, and of the 67, nearly half were later released. None of the prosecutors in those cases faced criminal charges or disbarment.

In addition to its international recognition, the role of the prosecutor in American and English criminal justice is of considerable preeminence. Historically, the American profile of the prosecutorial role has an ancestral linkage with its British counterpart. Hence, their juridicial affinity. Admittedly, in the contemporary context of American criminal justice, it is difficult to articulate precisely the nature and scope of the prosecutorial function for two main reasons. First, the prevalence of flexible and often times ambiguous statutory, judicial, and professional guidelines. Second, the role played by pragmatism and expediency in the evolution and development of this very important American institution. This difficulty was alluded to by Steven Phillips, a former assistant district attorney in Bronx County, New York, in his definition of the prosecutorial role as reflecting a tremendous ambivalence-almost a schizophrenia; on the one hand, as a trial advocate, expected to do everything in his power to obtain convictions and on the other hand, as sworn to administer justice dispassionately, to seek humane dispositions rather than to blindly extract every last drop of punishment from every case (Inciardi, 1987: 351).

Analogously, in Britain, the prosecutor enjoys tremendous discretionary powers, the exercise of which revolves around the acknowledgement and recognition of two specific criteria: whether there is sufficient evidence to warrant prosecution (the "realistic prospects of conviction" test) and whether prosecution is deemed to be in the public interest (Hirschel and Wakefield, 1995: 122; Fionda, 1995: 22). Even far afield in the Romano-Germanic or civil law systems of law, notably Germany, the Netherlands, France, and Scotland, prosecutors enjoy equally enormous discretionary powers during both the trial and sentencing phases of a criminal case as those of their American and English counterparts (Fionda, 1995: 22).

Our research shows that the American profile of the prosecutorial role can be inferred from both the American Bar Association Recommended Prosecution Function Standards (which though never adopted still carry some weight) and isolated judicial pronouncements on the nature and scope of the prosecutor's role in American society. According to the American Bar Association Function Standards, the prosecutor is "an administrator of justice, an advocate, and an officer of the court" whose obligation is to "exercise sound discre-

tion in the performance of his/her functions," whose primary objective is to "seek justice, not merely to convict." (Standard 3-1.2). This portrayal of the prosecutorial function received the highest and most authoritative judicial endorsement in the landmark case of *Berger v. United States*[9] thus:

> *The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do-so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction, as it is to use every legitimate means to bring about a just one.*[10]

A similar judicial conception of the prosecutorial function was articulated in the case of the *Attorney General v. Tufts*.[11] There, the High Court of Massachusetts described the powers enjoyed by district attorneys in these terms:

> *Powers* so *great impose responsibilities correspondingly grave. They demand character incomparable, reputation unsullied, a high standard of professional ethics, and sound judgement of no mean order... the office is ... to be held and administered wholly in the interests of the people at large and with a single eye to their welfare.*

Consistent with the above analysis, our research discloses further that a not dissimilar portrayal of the Kentucky profile of the Commonwealth Attorney is deducible mainly from the Kentucky Rules of Professional Conduct. The official portrait is that of a minister of justice and not simply that of an advocate. The responsibility is expressed as involving the specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Ample judicial support for this conception of the Commonwealth Attorney's role in the courts of Kentucky dates as far back as the 1920's. One of the earliest decisions was *Bailey v. Commonwealth*[12] where the Court observed that:

> *The duty of a prosecuting attorney is not to persecute, but to prosecute, and that he should endeavor to protect the innocent as well as prosecute the guilty, and should always be interested in seeing that the truth and the right shall prevail.*

In *Lickliter v. Commonwealth*[13] it was likewise noted that the prosecuting attorney's duty is to see that justice is done and nothing more. A more modern judicial exposition of the Commonwealth Attorney's role is found in the case of *Niemeyer v. Commonwealth*.[14] There, the Supreme Court of Kentucky characterized the office in these terms:

> *One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth's Attorney. Its very status becomes* a *mantle of great power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn, to wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, which means the law as laid down by the duly constituted authorities and not as the prosecuting attorney may think it ought to be.*

C. Prosecutorial Misconduct

One recurring theme underlying the above analyses of the prosecutorial role is that there are clear ethical obligations attaching to the prosecutorial office. Based on this premise, it follows that grave breaches of prosecutorial ethics are *per se* instances of prosecutorial misconduct, though, admittedly, there are varying degrees of prosecutorial misconduct.

1. Definition

This section of the report is devoted to an articulation of an operational definition of the concept of prosecutorial misconduct and the various contours of prosecutorial misconduct as illustrated by case-law authorities. In broad conceptual terms, prosecutorial misconduct may be perceived as a species or brand of serious deviation from professional norms. One constructive approach to the definition of prosecutorial misconduct is to treat the concept as not having a fixed meaning, but as one whose categories are inexhaustive, varying with the particular facts and circumstances of each case in light of the applicable norms and values regulating prosecutorial conduct and performance. The general operational definition adopted in this study is prosecutorial conduct that is in gross violation of a prosecutor's professional obligations and responsibilities including the ethical duties concomitant with the office.

More specifically, the contours of prosecutorial improprieties occurring during the guilt and penalty phases encompass a wide range of activities including:

- suppressing evidence;
- using fake evidence;
- lying to the jury about defendant's past criminal history;[15]
- concealing exculpatory evidence and failing to turn over to the defense or the court exculpatory material;[16]

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- making off the-record comments about uncharged conduct or matters conducted before a grand jury;
- improper closing arguments;[17]
- commenting on a defendant's silence;
- knowingly or intentionally alluding to irrelevant or inadmissible matter, or misleading the jury as to inferences to be drawn from the evidence; and,
- using arguments and introducing evidence calculated to inflame the passions of the jury.[18]

2. Implications for the Rule of Law and Human Rights

The authors contend that the adverse impact prosecutorial misconduct has on the rule of law and the concept of human rights can be no greater and more repercussive than during the guilt and/or penalty phase of a death penalty case. From the perspective of the rule of law, due to the tremendous accretion of prosecutorial discretions enjoyed by prosecutors in the U.S. and the lack of well-crafted and effective legislative and judicial safeguards against prosecutorial excesses, it is a grave threat to the rule of law whenever a defendant is convicted of a capital offense, not exclusively on the basis of sufficiency of evidence but due, in part, to prosecutorial misbehavior.

A system that accords primacy to human dignity, due process, and equal protection, as does the American constitutional system, cannot be insensitive to threats from within the system evidently designed to protect the value and concept of human rights. Where prosecutorial misconduct becomes, in the familiar legal metaphor, "an unruly horse" it can gravely endanger the concept of human rights thereby depriving the criminal law, in language reminiscent of Blackstone, of its quintessential procedural safeguards to the "trichotomy of life, liberty, and property" (Boorstin, 1996: 148). "When this happens, the justice process cannot escape censure for being a facilitator or an engine of injustice" (Thompson, 1997: 295).

IV. The Study: Its Empirical Context

1. Objectives

Given the obligations of a prosecutor and the problems and concerns with misconduct by prosecutors in capital cases, as discussed above in Part I, the objective of this study was to determine the following:

1. Whether prosecutorial misconduct has occurred in capital cases in the Commonwealth of Kentucky;
2. If there is evidence of prosecutorial misconduct in this context, then how prevalent is the misconduct;
3. If there is evidence of prosecutorial misconduct in this context, then what are the most prevalent forms of misconduct; and
4. Whether the frequency of prosecutorial misconduct in this context warrants the development and implementation of remedial measures.

2. Methodology

In developing the methodology for the study, it was necessary to select the parameters of the time frame for the data. Making this determination required taking into consideration that in 1972 the United States Supreme Court held that the death penalty as administered in the United States violated the Eighth Amendment's proscription against the infliction of cruel and unusual punishment.[19] Subsequently, in 1976 the Court held that the death penalty was not *per se* unconstitutional and approved the new capital sentencing scheme enacted by the Georgia legislature in response to the Court's opinion in *Furman*.[20] On December 22, 1976, the Commonwealth of Kentucky adopted a capital sentencing scheme[21] similar to that approved by the Court in Gregg. Consequently, in order for a capital case to be deemed eligible for the study the death sentence had to be imposed after the activation of Kentucky's newly adopted death penalty legislation. At the other end of the time frame spectrum, the authors decided that in order to qualify the death sentence in a capital case had to have been imposed before June 30, 2000.

After identifying which cases satisfied this eligibility requirement, the authors then had to ascertain which of these cases could progress to the qualifying stage. This required determining which of the eligible cases had, at the minimum, an opinion issued by the Kentucky Supreme Court responding to issues raised by the capital offender's automatic direct appeal from the judgment and sentence entered by the capital trial judge.[22] It was from this pool of qualifying cases that the data for the study was extrapolated.

The judicial opinions of each case that advanced to inclusion in the pool of qualifying cases were then identified, located, and reviewed by the authors. The objective of the reviewing process was to determine whether evidence of prosecutorial misconduct existed in any of the cases. The authors devised three analytical categories to facilitate the evaluation of the cases in the qualifying pool.

The first, and more objective, category focused on whether the offender raised and the judiciary expressly acknowledged the presence of prosecutorial actions that constituted prosecutorial misconduct that was the sole basis or contributing factor for reversal.

The second category encompassed situations where the reviewing court expressly mentioned the issue raised by the condemned person in terms of possibly constituting prosecutorial misconduct, but relied upon other grounds to reverse the case. In the third, and more subjective category while the objected behavior had not been formally labeled prosecutorial misconduct, it, nonetheless could be reasonably inferred that the prosecutor's actions constituted prosecutorial misconduct. For example, under the third cat-

egory the authors might agree that prosecutorial misconduct existed in substance even though the reviewing court formally analyzed and discussed it under the legal rubric of admissibility of evidence. Furthermore, the authors had to concur on their independent assessment expressly or implicitly on an alleged instance of prosecutorial misconduct before it could conclusively be deemed to be one of prosecutorial misconduct and consequently be subjected to further analysis. At this stage of the evaluative process, the authors determined the aggregate number of instances of prosecutorial misconduct, and the number of capital cases in which such conduct occurred.[23] Due to the subjective attributes of the third category the authors engaged in a vigorous debate about the final designation of the incidents identified in that category. To ensure the integrity of the empirical study, the authors erred on the side of exclusion rather than inclusion.

After identifying the cases in which prosecutorial misconduct occurred and the individual instances of prosecutorial misconduct, the authors reviewed them again with the objective of assigning them to one of three additional categories developed for the purpose of conducting this study. These three categories were designed to facilitate the completion of the study's analytical facet. The three categories are: evidentiary; prosecutorial statements; and ethics/integrity. Subsequently, to enrich the depth of analysis, subcategories were developed for the evidentiary and prosecutorial statements categories and the relevant instances were assigned to the applicable general and subcategory. The evidentiary subcategories are: visual/audio presentations; victim impact statements; improper strategy; and exculpatory evidence. The prosecutorial statements subcategories are: undermining juror responsibility; statements designed to generate prejudice and passion among the jurors; misstating law or fact; expressing personal opinions; examining witnesses and misstating facts; commenting on the defendant's silence; and statements made during the capital jury *voir dire*. To further the study's integrity, the authors were very careful not to engage in "double-counting" when assigning an instance of prosecutorial misconduct to its appropriate category. Consequently, an instance of prosecutorial misconduct was assigned to only one category and when applicable to only one subcategory.

The authors devised a Data Compilation Form[24] and one for each case identified for inclusion in the eligible pool of cases was completed. The conscientious completion of each form required the expenditure of a substantial amount of time and the utilization of a multitude of sources including the judicial opinions issued in each case, newspaper articles, and when necessary, and possible, consulting with the offender's trial counsel.

...the deleterious impact of prosecutorial misconduct in the American criminal justice system, or any criminal justice system for that matter, today should be understood and addressed.

3. Findings

The authors identified sixty-nine (69) cases in which the death penalty was imposed during the relevant time period. Thus, the pool of eligible cases was composed of sixty-nine (69) cases. This figure includes six (6) cases where three (3) offenders each had two (2) capital trials and death sentences were imposed in each of the six (6) separate trials. The authors determined that fifty-five (55), or 79.9%, of the eligible sixty-nine (69) cases satisfied the criteria for inclusion in the qualifying pool.[25] The authors then found evidence of prosecutorial misconduct in 47.3%, nearly one-half, of these fifty-five (55) qualifying cases.[26]

4. Analysis of Data

The authors identified a total of fifty-five (55) separate instances of prosecutorial misconduct in these twenty-six (26) qualifying cases.[27] The largest concentration of instances of prosecutorial misconduct were found in the prosecutorial statement category as thirty-four (34), or 61.82%, of the fifty-five (55) instances were assigned to this general category of misconduct.[28] The next largest group of instances of prosecutorial misconduct, with eighteen (18) recorded instances, were found in the evidentiary category. The fewest instances of prosecutorial misconduct, with three (3) incidents were recorded in the ethics category.[29]

Accounting for nine (9) of the thirty-four (34) instances of prosecutorial misconduct due to statements made by prosecutors, the authors discovered that the juror responsibility subcategory of the prosecutorial statements category represents a significant problem area in prosecutorial misconduct amounting to a contravention of the constitutional principle announced by the U.S. Supreme Court in *Caldwell*.[30] There, the Court vacated a death sentence because the prosecutor improperly minimized the capital jurors "truly awesome" responsibility in determining the appropriate sentencing that it should not consider itself responsible if it sentenced the defendant to death since the death sentence would be automatically appealed and reviewed for correctness by the Mississippi Supreme Court.[31] Out of the thirty-four (34) eleven (11) were found to involve prosecutorial improprieties like expression of personal opinions (the so-called "golden rule" violation), commenting on the defendant's silence (in violation of the Fifth Amendment privilege against self-incrimination), impropriety during the jury *voire dire*, for example, failure on the part of the prosecutor to disclose jury bias. Evidentiary improprieties prevailed in eighteen (18) cases. They specifically concerned: improper strategies such as visual/audio representations, for example, the introduction of gruesome crime scene and autopsy photographs, improper

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use of victim impact statements', and the failure to disclose exculpatory evidence.

Under the ethics/integrity category, the authors referenced only cases where, for example, the reviewing court, as a result of a series of isolated instances of prosecutorial improprieties, characterized the prosecutor's trial tactics as being similar to a "guerilla warfare" culminating in a deprivation of the defendant's right to a fair trial.

5. Conclusion

The authors strongly maintain that, on the whole, the findings as reported support the conclusion that for the time period under review prosecutorial misconduct in capital cases in Kentucky was alarmingly prevalent. In summary, the authors strongly contend that their findings point irresistibly to the conclusion that prosecutorial misconduct poses a significant and serious problem in the adjudication of capital cases in Kentucky and requires remediation.

V. Recommendations for Remedying Prosecutorial Misconduct

Having determined that the existence of prosecutorial misconduct in capital cases requires the adoption and implementation of remedial measures, the authors decided that these remedies could best be examined if they were assigned to one of the following categories: Professional Remedies; Judicial Remedies; Legislative Remedies; and Litigation Remedies.

In recommending remedies for prosecutorial misconduct it is necessary to describe briefly the capital review process. In *Furman v. Georgia* and in later cases, the U.S. Supreme Court required state high courts to review all death sentences on direct appeal. As a consequence, the law of nearly all states is that capital judgments be automatically appealed (Liebman et al., 2000:19). In Kentucky, capital cases are appealed directly from the state circuit court to the Kentucky Supreme Court.

1. Professional Remedies

The authors take the view that the problem of combating prosecutorial impropriety by resorting to state bar disciplinary committees is legally one of the effective existing available remedies. Utilizing this remedial tool, however, requires waging the battle on several fronts. First, at the professional level frequent, strict, and effective enforcement of existing disciplinary mechanisms must be invoked. Examples of professional disciplinary tools include the civil discipline of an offending prosecutor by the legal profession and bar associations; the grievance committees imposing disciplinary sanctions against a prosecutor, censure and temporary suspension from practice and permanent debarment (Gershman 1999: 16). Former Chief Justice Burger wrote: "A bar association conscious of its public obligations would *sua sponte* call to account an attorney guilty of the misconduct shown here."[32] Unfortunately, bar associations do not frequently invoke their disciplinary powers as a corrective against prosecutorial misconduct.

...prosecutorial misconduct poses a significant and serious problem in the adjudication of capital cases in Kentucky and requires remediation.

2. Judicial Remedies

Before recommending judicial remedies to the problems posed by prosecutorial misconduct it is helpful to review a critical aspect of the judicial review process in capital cases in order to appreciate how that interacts with the prevalence of prosecutorial misconduct and remedying it. In *Gregg v. Georgia* the United States Supreme Court approved Georgia's new capital sentencing scheme, which included the requirement that the conviction and death sentence in a capital case be automatically appealed to the Georgia Supreme Court, the highest appellate court in that state.[33] Subsequently, nearly all states with the death penalty, including Kentucky, adopted a similar mandatory direct appeal rule.[34]

Reversal of a capital conviction or sentence on direct appeal requires a showing of "serious error." Regrettably, this requirement has led to the frequent application of the judicial doctrine of "harmless error" rendering nugatory explicit and unambiguous findings of grave prosecutorial misconduct. "Harmless error" exists if the wrongful action did not prejudice the offender's conviction or sentence. While a variety of factors can be relied upon in finding that the error was harmless, probably the most prevalent factor is the strength of the evidence against the defendant's innocence. The stronger the evidence of guilt is, then the more likely that the error will be considered harmless (Gershman 1999: 14). Consequently, if an error is deemed "harmless," then that error is invalidated as a reason supporting a reversal.[35] The authors contend that the most effective remedy against prosecutorial misconduct is the abolition of the "harmless error" doctrine. Such a doctrine is inconsistent with the principle of fundamental fairness and ought to be abolished if the courts are not to be perceived as "condoning prosecutorial lawlessness and promoting disregard for the law."[36]

Under the harmless error rule appellate courts are authorized to ignore trial errors that were not prejudicial to the defendant's substantive rights. Every jurisdiction has this rule.[37] The application of the "harmless error" doctrine, like the principle of necessity, is tantamount to the exercise of a judicial dispensing power legitimizing prosecutorial impropriety which, by reference to the strict criteria of legality, is manifestly unfair or illegal. It is a result-oriented approach by

the appellate courts, which shifts the focus from fairness to guilt. The practical consequences of the adoption of the remedy of abolition would be to render prosecutorial misconduct a *per se* error and thus, depending upon whether the prosecutorial misconduct occurred during the guilt or penalty phase of the capital trial proceedings, providing grounds for the reversal of the conviction or the death sentence.[38]

Two other judicially-initiated remedies call for greater judicial intervention during the capital trial when the prosecutorial misconduct is occurring.[39] First, trial judges should enhance their vigilance with respect to sustaining defense objections to prosecutorial actions that do or could constitute prosecutorial misconduct.[40] If the capital defense attorney fails to interject an objection, then the trial judge should have the responsibility of independently preventing the prosecutor from engaging in misconduct by objecting *sua sponte* to the proposed or completed activity. If the defense or trial judge has lodged the objection before the jury, and in the case of the defense, the objection has been sustained, then the issuance of a curative instruction is another judicial remedy.[41] The other judicial remedy that has been proposed is for trial judges to promptly issue a "stern rebuke" to the prosecutor and if necessary impose repressive measures,[42] such as holding the prosecutor in contempt of court or declaring a mistrial, in order to punish the prosecutor for employing such tactics and to deter the prosecutor from reengaging in misconduct during the trial.

3. Post-Trial Judicial Remedies

There are several post-trial judicial remedial options. First, for particularly egregious instances of misconduct and/or for repeated instances of prosecutorial misconduct, the prosecutor's privilege of prosecuting in that judicial district could be revoked. Another post-trial remedy exists at the appellate level. If the reviewing court in a capital case determines that the prosecutor engaged in misconduct during the proceedings, then in addition to describing the offending behavior, and possibly invoking the *per se* error rule, the justices should no longer allow transgressing prosecutors to be shielded by a cloak of anonymity. In other words, the offending prosecutor would be personally identified in capital appellate opinions. Furthermore, removing the protection provided by anonymity could be further enhanced if courts adopted a rule prohibiting reviewing courts from designating opinions as "nonpublishable" in cases where prosecutorial misconduct was found.

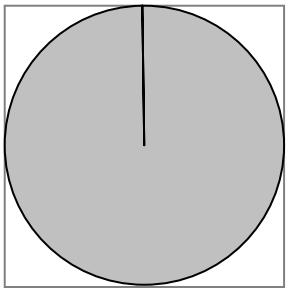
4. Legislative Remedies

Finally, proposed legislative sanctions for prosecutorial misconduct include (a) mandatory removal from office, (b) restructuring of the organization of the prosecution of capital cases so as to diminish the incidence of prosecutorial impropriety, (c)elimination or modification of the doctrine of prosecutorial immunity, and (d) express criminalization of prosecutorial misconduct.

VI. Charts

Chart A

ELIGIBLE KENTUCKY CAPITAL CASES[1]



Total Pool = 69 Cases[2]

[1]Eligibility was determined in accordance with the following criteria:
- the defendant was charged, convicted, and sentenced to death after December of 1976 (after the Kentucky legislature, pursuant to the US Supreme Court's ruling in *Gregg v. Georgia*, revised the state's death penalty by modeling it after Georgia's, the state who's death penalty legislation the Court had approved in *Gregg* on July 02, 1976); and
- the defendant was charged, convicted, and formally sentenced to death before June 30, 2000.

[2]This figure includes three individuals who each have death sentences received from two separate trials. Thus, the total pool of cases includes these six cases.

Prosecutorial Misconduct

Jerry Cox reviewed the law on prosecutorial misconduct in "Prosecutorial Misconduct: A Kentucky Primer," *The Advocate*, Vol. 23, No. 2 (March 2001). It is a helpful resource for litigators, as well as a commentary on problems in Kentucky. It is available on the web at: http://dpa.state.ky.us/library/advocate/mar01/advframe.html

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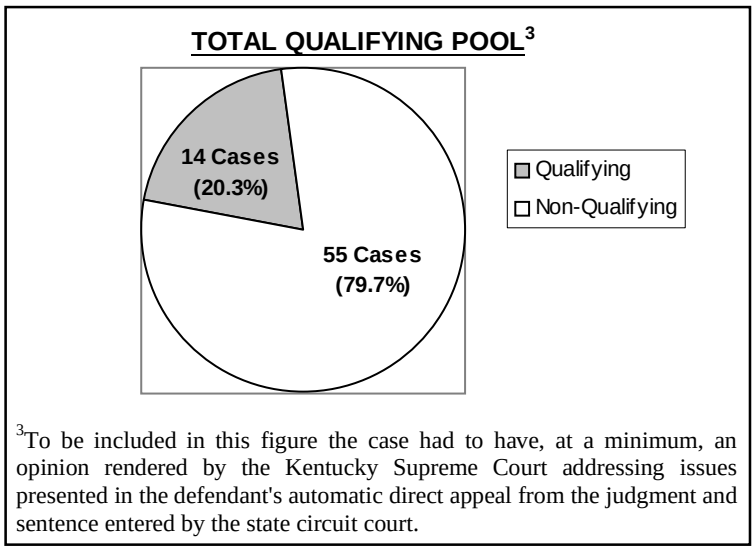
Chart B



[3]To be included in this figure the case had to have, at a minimum, an opinion rendered by the Kentucky Supreme Court addressing issues presented in the defendant's automatic direct appeal from the judgment and sentence entered by the state circuit court.

Chart C

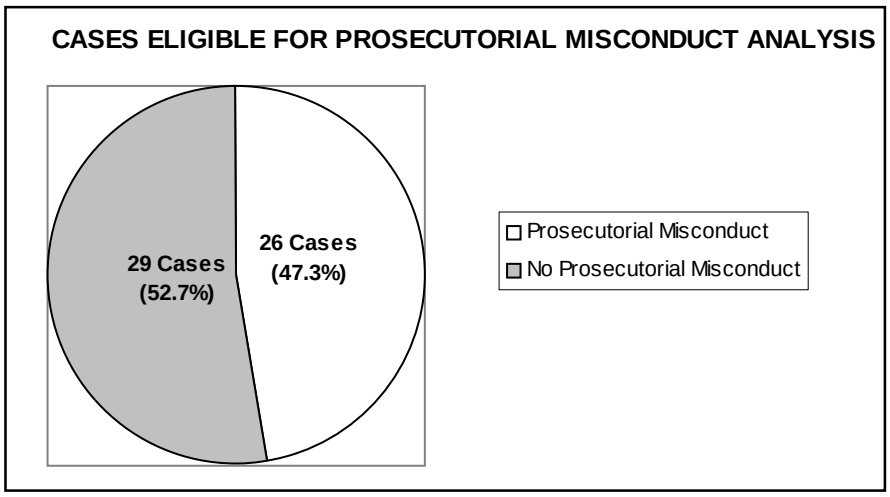
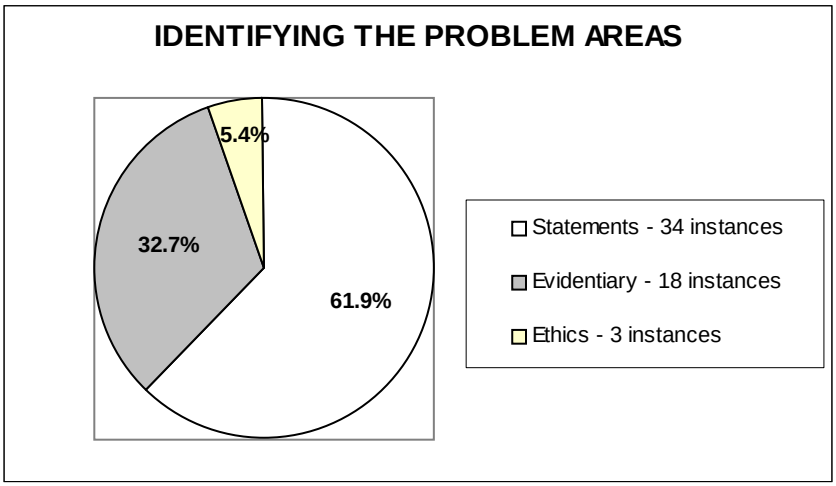


Chart D



VII. Appendix

PROCEDURAL MISCONDUCT STUDY DATA SHEET
Post-Gregg Death Penalty Cases in Kentucky

Case Name: _____
Citation: _____
Judge's Name: _____
Year of Trial: _____
Commonwealth Attorney: _____
Prosecuting Attorney: _____
Assistant Prosecuting Attorney: _____
Defense Attorney: _____
Private Counsel: ___ ___
Y N
PD/DPA: ___ ___
Y N
Defendant's Name: _____
Defendant's Race: _____
Defendant's Age at time of Crime: _____
Victim(s) Name(s): _____
Victim(s) Race(s): _____
Victim(s) Age(s): _____
Crime(s): _____
Aggravator(s): _____
County of Crime(s): _____
County Where Tried: _____
Year Capital Crime Committed: _____
Crime(s): _____
Aggravator(s): _____
County of Crime(s): _____
County Where Tried: _____
Year Capital Crime Committed: _____
Defendant Have Prior Felony Conviction(s): ___ ___
Y N
If Yes, Violent Felony Conviction(s): ___ ___
Y N
If Yes, Describe: _____
(*i.e.*, rape, homicide(degree), armed robbery, aggravated assault, etc.)
Guilt Reversed: ___ ___
Y N
Penalty Only Reversed: ___ ___
Y N
Prosecutorial Misconduct Stated Basis for Reversal: _ _
Y N
If so, did it occur in guilt phase: ___ ___
Y N
If so, did it occur in penalty phase: ___ ___
Y N
Type of misconduct in guilt phase: _____
(write applicable number(s)-see sheet)
If wrote 12, describe: _____
Prosecutor mentioned by name in opinion: ___ ___
Y N

This prosecutorial misconduct **not the stated basis** for reversal, but **discussed?** ___ ___
Y N
If so, discussed re-guilt phase: ___ ___
Y N
If so, type of misconduct: _____
(write in applicable number(s))
If 12, describe: _____
If prosecutorial misconduct was not the basis for reversal or was not discussed; do the facts indicate that it was present: _ _ _
Y N (can't determine)
If so, guilt phase: ___ ___
Y N
If so, type: _____
(write in applicable number(s))
If 12, describe: _____

DISPOSITION ON RETRIAL

Date of Retrial: _____
Country of Retrial: _____
Judge: _____
Commonwealth Attorney: _____
Prosecuting Attorney(s): _____
Defense Attorney(s): _____
PD/DPA: _____
Death sought at Retrial: ___ ___
Y N

Guilt Phase
Guilty: ___ ___
Y N
If yes, describe crime(s): _____

Penalty Phase
Death: ___ ___
Y N
If NO, Sentence: _____
(LWOP, life/25, life, # of years)

Other Disposition
Plea Bargain: ___ ___
Y N
Guilt: _____
(list crime(s))
Penalty: _____
(LWOP, life/25, life, # of years)

Other Pertinent Information:
_____
_____
_____
_____

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Caldwell v. Mississippi, 472 U.S. 320 (1985)
Furman v. Georgia, 408 U.S. 238 (1972)
Goff v. Commonwealth, Ky., 44 S.W. 2d 306 (1931)
Gregg v. Georgia, 428 U.S. 153 (1976)
Imbler v. Pachtman, 424 U.S. 409 (1976)
Jackson v. Commonwealth, Ky., 192 S.W. 2d 480 (1946)
King v. Commonwealth, Ky., 70 S.W. 2d 667 (1934)
Lichliter v. Commonwealth, Ky., 60 S.W. 2d 355 (1933)
Niemeyer v. Commonwealth, Ky., 533 S.W. 2d 222 (1976)
People v. Pitts, 223 Cal. App. 3d (1990)
Stasell v. Commonwealth, Ky., 278 S.W. (1955)
United States v. Dinity, 426 U.S. 600 (1976)
United States v. Jackson, 41 F. 3d. 1231 (1994)
United States v. Neal, 25 F. 3d 219 (1996)
Woodson v. North Carolina, 428 U.S. 280 (1976)

X. ENDNOTES

1. *Berger v, United States*, 295 U.S. 78 (1935), *Brady v. Maryland*, 373 U.S. 83 (1963).
2. 428 U.S. 280 (1976).
3. 424 U. 5.409 (1976).
4. *Brady v. Maryland*, 373 U.S. 83 (1963).
5. Ky., 192 S.W.2d 480 (1946).
6. Ky., 44 S. W.2d 306 (1931).
7. Ky., 70 S.W.2d 667 (1934).
8. Ky., 278 S.W.2d 272 (1955).
9. 295 U.S. 78 (1935)
10. 295 U. S. 78 (1935) at 88.
11. 239 Mass. 488 (1921)
12. Ky., 237 S.W. 415 (1922)
13. Ky., 60 S.W.2d 355 (1933)
14. Ky., 533 S.W.2d. 222 (1976).
15. *United States v. Jackson, 41 F.* 3d 1231 (1994)
16. *Brady v. Maryland*, 373 U.S. 83 (1963)
17. *United States v. Neal*, 75 F 3d 219 (1996)
18. *People v. Pitts*, 223 Cal. App. 3d (1990)
19. *Furman v. Georgia*, 408 U.S. 238 (1972) *(per curiam)*
20. *Gregg v. Georgia, 428 U.S.* 153 (1976) (joint opinion)
21. See K.R.S. Section 532.030 (effective date was December 22, 1976)
22. See K.R.S. Section 532.075 (1)
23. The authors spent innumerable hours meeting, participating in telephone conferences, and exchanging faxes in order to make these critical initial designations.
24. *See* Appendix (containing a reproduction of the Data Compilation Form)
25. *See* Chart B
26. *See* Chart C
27. *See* Chart C
28. *See* Chart D
29. *Id.*
30. *Caldwell v. Mississippi*, 472 U.S. 320 (1985)
31. *Id.*
32. *U.S. v. Dinity*, 426 U.S. 600 (1976)
33. 428 U.S. 153 (1972)
34. KRS 532.075 (1976)
35. See a prototypical example of this rule: [a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. See also (Gershman 1999: 14).
36. *U.S. Antonelli Fireworks Co.* 155F. 2d. 631 (C.C.A.2d Cir. 1946) (Frank J, dissenting). *See United States v. Modica* 663 F. 2d. 1173 (2d Cir. 1981). Where the same court expressed its "frustrating failure" at the "appearance on its docket of cases in which prosecutors have delivered improper summations. Recalling the famous dissenting opinion by Justice Frank in *Antonelli Fireworks Co.*, the court acknowledged that an attitude of

"helpless piety" and the use of "purely ceremonial language" encourages prosecutorial excesses and breeds a deplorable cynical attitude towards the judiciary.

37. Federal Rule of Criminal Procedure 52(a) provides a prototypical example of this rule: [a]ny error, defect, irregularity or variance which does hot affect substantial rights shall be disregarded. (See also, Gershman 1999: 14)
38. Furthermore, automatic reversals could prove to be a powerful deterrent to the occurrence of prosecutorial misconduct. *See Antonelli Fireworks,* 155 F. 2d at 661-62 (in his dissenting opinion Judge Frank notes how the reversal, rather than the affirmance, of criminal cases in which instances of prosecutorial misconduct are evident can work to deter such actions from happening in the first place)
39. *See Berger v. United States, 295 U.S. 78, 84* (1935) (noting that it is appropriate for the trial judge to initiate actions curbing and remedying prosecutorial misconduct during a non-capital criminal trial)
40. *See Id.* at 85
41. *See Id.*. at 85; Antonelli: 22, 155 F.2d. at 655 (Frank J. dissenting)
42. *Berger v. United States,* 295U.S. at 85 ■

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The Fourth Amendment Requirement of Prompt Judicial Determination of Probable Cause

Twenty seven years ago the U.S. Supreme Court held that a person arrested without a warrant is entitled to a "prompt" judicial determination of probable cause for the arrest. *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854 (1975). Recognizing the variety of procedures employed by the states for initiation of judicial proceedings against an accused, the Court did not dictate a particular method for this determination, nor define the term "prompt." A group of arrestees later brought a civil rights action under 42 U.S.C. Section 1983 against a California county for violation of this right. After the county appealed the district court ruling that a judicial probable cause determination must be completed within 36 hours, the court of appeals held that such a determination must be made within 24 hours of arrest. California law, like Kentucky's RCr 3.02 required an initial appearance before a judge "without unnecessary delay." The county policy required that the arraignment be within a maximum of two days from arrest, but excluded weekends and holidays from the calculations, thus allowing delays of 5 to 7 days on holiday weekends.

The U.S. Supreme Court granted *certiorari* to finally define "what is 'prompt' under *Gerstein.*" Attorney generals of 22 states (Kentucky not one of them) filed *amicus* briefs for relief from the 24 hour court of appeals definition. The Supreme Court adopted a 48 hour definition of promptness under *Gerstein* by a 5-4 vote. The dissent, which is surprising for its composition and its vehemence, believed that the county "must provide probable-cause hearings as soon as it completes the administrative steps incident to arrest." Justice Scalia rebuked the majority's "practical compromise" as an affront to the Bill of Rights and our common-law heritage, concluding:

> While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own. *County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 1677 (1991).*

Yes, 1991. I write this article as though it were breaking news because apparently, to most of us in Kentucky, it is. Not only has there been no *Gerstein* "promptness" litigation in Kentucky, neither *Gerstein* nor *McLauglin* have ever been cited in a published Kentucky opinion. While jurisdictions and

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officials in each of the other states in the Sixth Circuit have been involved in appellate civil rights litigation in that forum, which has repeatedly held this right to be so clearly established that officials as defendants enjoy no "qualified immunity" for their actions, *see Alkire v. Irving*, 305 F.3d 456 (6th Cir. 2002), no Kentucky case on this issue has reached that court. Unfortunately, this lack of litigation is not due to our judicial system's compliance with *Gerstein* and *McLaughlin*: in many rural Kentucky counties (where district court convenes once or twice a week) defendants do wait 5-7 days after arrest to see a judge. Persons arrested after court on a Friday are only seen within 48 hours in one or two urban counties, although even the *McLaughlin* majority recognized that weekends could not be excluded from the 48 hour calculation.

In that majority of cases in which the defendant is promptly arraigned, judges do not then conduct any probable cause hearing or make a determination without a hearing. There is nothing in our rules of court or administrative procedures to trigger such a determination or even to let the judge know that such a determination is required (by the fact of the warrantless arrest). Waiting any period beyond 48 hours to permit the adversarial probable cause hearing contemplated to be held within 10 days per RCr 3.10 does not comply with these Fourth Amendment rulings.

Our Rules of Court do provide the mechanism for such a probable cause determination. RCr 3.02 requires any person making a warrantless arrest to take the arrestee before a judge without unnecessary delay and further requires them to file with the court a post-arrest complaint specifying the alleged offense and the "essential facts constituting probable cause on which the complaint is based." The post arrest complaint is incorporated in the Uniform Citation, KSP form 206. However, officers frequently simply list the charge there, without relating any of the essential facts. A court reviewing that post arrest complaint at arraignment should immediately release the accused under the *Gerstein* rule for lack of probable cause.

Occasionally (experience varies widely by jurisdiction) a defendant is brought before the court for arraignment without any citation, warrant, or other paperwork. This too should result in immediate release of the accused for lack of probable cause to hold him or her. The person making the arrest is to file the post arrest complaint with the court, and on those occasions when no judge is available in the county of arrest and the defendant is taken to jail "any documents relating to the arrest shall be given to the jailer." RCr 3.02(3). They must then be delivered to the clerk on or before the next business day, RCr 3.02(4). If the rules are followed people won't be brought before the court without paperwork, and if there is no document to review for probable cause the Fourth Amendment has been violated.

Our district courts can be overwhelming to all involved on arraignment days/dockets, and some of our defender offices are not adequately staffed to have lawyers present at each arraignment docket. Nonetheless, as lawyers and judges we have cause to be ashamed if we do not make an effort to protect this most fundamental right of all of our citizens. Competent counsel must take the time to discern at arraignment whether the defendant is in custody as the result of a warrantless arrest, and request an immediate review of probable cause for continued detention. Judges who may already feel burdened by large dockets and the mandatory 24 hour review of pretrial release eligibility of detained persons must recognize the distinction between the familiar bail review and a probable cause review which may not be familiar outside of warrant applications and preliminary hearings.

Justice Scalia, in his dissent, related a story to emphasize why 48 hours was too long: "A few weeks before issuance of today's opinion there appeared in the Washington Post the story of protracted litigation arising from the arrest of a student who entered a restaurant in Charlottesville, Virginia, one evening, to look for some friends. Failing to find them, he tried to leave—but refused to pay a $5 fee (required by the restaurant's posted rules) for failing to return a red tab he had been issued to keep track of his orders. According to the story, he 'was taken by police to the Charlottesville jail' at the restaurant's request. 'There, a magistrate refused to issue an arrest warrant,' and he was released. Washington Post, Apr. 29, 1991, p. 1. That is how it used to be; but not, according to today's decision, how it must be in the future. If the Fourth Amendment meant then what the Court says it does now, the student could lawfully have been held for as long as it would have taken to arrange for his arraignment, up to a maximum of 48 hours. Justice Story wrote that the Fourth Amendment 'is little more than the affirmance of a great constitutional doctrine of the common law.' 3 J. Story, Commentaries on the Constitution 748 (1833). It should not become less than that." *Id.* at 70-71. It is up to those of us "in the trenches" to make this right a reality and avoid the daily occurrence of locking up our citizens for no reason, as decried by Justice Scalia. ■

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COMMONWEALTH OF KENTUCKY
_____ DISTRICT COURT
CASE NO. 02-F-_____

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. MOTION TO DISMISS

_____, DEFENDANT

The defendant _____ respectfully moves this Court to dismiss the above captioned felony charges against him for violation of RCr 3.02(4) and/ or RCr 2.12 and the Fourth Amendment to the United States Constitution. In support of this motion the defendant respectfully represents:

1) The defendant was arrested prior to March 15, 2002 and arraigned on March 18, 2002, but at the time of his arraignment and again on March 19 when defense counsel requested that the clerk provide a copy of the warrant or post-arrest complaint in this case, the clerk of this court was not in possession of either charging document involving this defendant:
2) RCr 2.12 provides that an officer serving a warrant on an accused "shall make return thereof to the court to which it was made returnable within a reasonable time of its execution:" further, RCr 3.02(3) authorizes an officer serving a warrant when no judge is available to lodge the defendant in jail, but section (4) of the rule requires that any documents concerning the arrest left in possession of the jailer "shall be delivered to the clerk on or before the next business day."
3) The purpose of these rules is to allow the court to review whether there was probable cause to arrest the defendant, which review is required to be performed within 48 hours (not excluding weekends), *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L.Ed.2d 49, 111 S.Ct. 1661 (1991)
4) As that review cannot have been timely performed when no documents were available for review, in violation of RCr 2.12 and 3.02, the defendant's continued detention is in violation of the Fourth Amendment to the U.S. Constitution and Sections 10 and 11 of the Kentucky Constitution, and the defendant is entitled to immediate release.

WHEREFORE, the defendant respectfully moves that this case be dismissed and that the defendant be immediately released from custody.

Respectfully submitted,

_____

CORRECTION

In the November *Advocate* in the review of Kentucky cases we said that in ***Hughes v. Commonwealth*** , **— S.W.3d. 2000-SC-156-MR (August 22, 2002) (Affirming)**, **it was stated: Violent offenders under the 1998 version of KRS 439.3401 are eligible for parole at 85% or 12 years, whichever is less.** The Supreme Court readopted its ruling in *Sanders v. Commonwealth*, Ky., 844 S.W.2d 381 (1992). Thus, violent offenders under the 1998 version of KRS 439.3401 are eligible for parole after serving either 85% of their sentence or 12 years, whichever is less. The Court held that the legislature adopted this construction of the 1998 statute because it was aware of this interpretation of the older statute and yet substantially re-enacted the old statute.

This is incorrect as to the maximum number of years for parole eligibility under KRS 439.3401. It should have read: **Thus, violent offenders under the 1998 version of KRS 439.3401 are eligible for parole after serving either 85% of their sentence or 20 years, whichever is less.**

In the Spotlight . . . . Amy Robinson

"Hope" is the thing with feathers—
That perches in the soul—
And sings the tunes without the words—
And never stops—at all—

Emily Dickinson

"Since the entry of this Court's Orders on August 14, 2002 and August 23, 2002, and on further reflection and the Court being of the belief that one should admit one's mistakes, the Court believes that the evidence provided by the Defendant in the RCr 11.42 Hearing is sufficient to justify a new trial."

Commonwealth of Kentucky v. Robert Coleman

When Amy Robinson read this order from the Bullitt Circuit Court to her client, 38 year-old Robert Coleman, he screamed and then broke down in tears.

For five long years, Robert sat in a jail cell and waited for justice to prevail. In those five years, his mother, who had doggedly proclaimed her son's innocence, passed away, never knowing the outcome of her child's case. Robert was not allowed to attend the funeral. For five years, Robert waited for someone to listen to his story of how he had been at work at the time the purported crime had taken place and how there was a witness to this fact. Finally, his case was championed by one of the Department of Public Advocacy's post conviction attorneys, Amy Robinson, and Robert's voice was heard.

Amy Robinson

"This kind of case gives me hope," Amy says. With the firm belief that her client was innocent of the crime for which he had been accused, Amy went to work with her co-counsel, Dennis Burke, to unearth evidence that had long been buried or destroyed. Denied the funds to hire an expert to help them with the investigation of the case, Amy and Dennis launched their own investigation, following leads, talking to witnesses and pouring through pages and pages of transcripts from the trial. Her tenacity paid off in this difficult case. Robert Coleman is currently out on bond and awaiting retrial.

The first thing you might notice when you meet Amy Robinson is the look of optimism and determination in her eyes. "I've always been for the underdog. . .", she says, ". . .always wanted to be a voice for those who had no voice." While acknowledging that some young attorneys fresh out of law school consider working as a public defender a "fall-back" job, Amy always knew that working for the DPA was where she belonged.

Amy first worked as a law clerk in the Juvenile Branch of the DPA for two summers in 1998 and 1999. When she completed law school, she was hired into the Post Conviction Branch as there were no openings at the time in Juvenile. By February, 2002, a position in the Juvenile Branch opened and Amy jumped at it, bringing along with her several of the adult post conviction cases on which she had been working. The *Coleman* case was one.

Working on the adult post-conviction cases had its rewards for Amy, but her heart has always been with the juvenile clients and now, in her role as a Juvenile Branch attorney, she is fulfilling a dream.

She enjoys working with juvenile clients because, "there's still hope that they can turn their lives around." These young people also present unique challenges for an attorney. Adult clients usually "come to you already knowing their problems but with juveniles, you have to dig deeper," she says. Currently, all of her juvenile clients are housed at the Cardinal Treatment Center in Louisville, which holds the more challenging juvenile cases in the state. With her background in sociology and psychology, Amy has a talent for tailoring her communication style to fit the needs of each individual child.

Rebecca DiLoreto, DPA's Post Trial Division Director, says of this young attorney, "Amy Robinson has a zest for life that infuses all aspects of her work at DPA. Not every public defender risks their lives in the line of duty. Amy Robinson is one who has done so. As a post conviction lawyer, Amy sought relief for a client in a heated case. She courageously and competently argued her motion knowing that out on the courthouse steps, surrounding her car were the victim's family members. As a lawyer for the juvenile branch, Amy exercises both compassion for the client and a critical analysis of the issues. This combination secures for her clients the best litigation advantage possible."

Amy likes the environment at DPA. There is a camaraderie in the Juvenile Branch which appeals to her. Other attorneys knock on her door to run an idea past her and she feels comfortable about visiting their offices as well. "There are so many people willing to help – to brainstorm with." It is this kind of open information highway that is certainly one of the department's strengths.

When asked what she would say to anyone wanting to work with juveniles, Amy replies, "The hardest thing is there is very little juvenile caselaw. . .", but even facing this challenge, her optimism rings through, ". . .so you have to be very creative. My advice would be to think outside the box." She flashes an infectious smile.

If *"Hope is the thing with feathers,"* then Amy Robinson undoubtedly lends wings to hundreds of young juvenile clients in Kentucky every year.

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Recruitment of Public Advocate Attorneys

Gill Pilati

The Kentucky Department of Public Advocacy is recruiting for staff attorneys to represent the indigent citizens of the Commonwealth of Kentucky for the following locations:

Columbia
Hazard
Paducah
Covington
Frankfort
Morehead

For further information and employment opportunities, please contact:

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Murray Field Office Open Door August 22, 2002

Rep. J.R. Gray and DPA Western Regional Manager, Tom Glover

l to r: DPA Trial Division Director, David Mejia; Murray State University President, King Alexander; Assistant Public Advocate, Chris McNeil; and, Public Advocate, Ernie Lewis

Circuit Judge Dennis Foust and Trial Division Director, David Mejia

l to r: Public Advocate, Ernie Lewis with the Murray Field Office: Melissa Cates, Robin Irwin, Shane Beaubien, Jason Gilbert, Directing Attorney, Scott West, Matt Jaimet, Linda Orr, and Tom Glover, Western Regional Manager

A Partnership Between Murray State and DPA: Students and Clients Benefit

It started out as an experiment. What would happen if you took Kentucky's Department of Public Advocacy, the state agency whose mission is to provide quality legal services to Kentucky's indigent accused, and placed an office on the campus of Murray State University, one of Kentucky's eight universities, and create an internship for students pursuing a criminal justice major or and minor? How would such a partnership benefit the clients of DPA? What impact would the internship have on MSU in general, and on the Criminal Justice Department in particular. Would the students who sign up for an internship find the experience rewarding, and worth the effort they put forth? And what about the criminal justice system generally – how would it respond to the presence of interns?

These were some of the questions that the architects of the program – MSU professors Mittie Southerland, Heather Perfetti, John Homa and Paul Lucko and DPA Western Regional Manager Tom Glover – had in mind when the internship began in the fall semester of 2000. Two years and 19 interns later, we have the answers: In summary, the experiment was a complete success, and will continue into the future.

Murray State University has embraced the internship; both former president Kern Alexander and current president King Alexander support the program. Even state officials, including Governor Paul Patton and State Senator Bob Jackson contributed to the success of a campus-located public advocate's office. Thus, the Murray field office which began in a two bedroom house on campus in 2001 is now headquartered and flourishes in a recently renovated 10-room manor across the street from the building which houses the Department of Social Work, Criminal Justice and Gerontology. Moreover, the breadth of the internship extends to the Hopkinsville and Paducah offices, where students who normally reside in those areas may pursue their interests closer to home. At all three locations, public defenders continue in their day-to-day representation of indigent clients, and are ably assisted in their investigations by a new crop of interns each semester.

Of course, there are multiple sides to this success story, and they are featured in this issue of *The Advocate*. Dr. Paul Lucko, Professor in the Department of Criminal Justice at Murray State University, and the professor who supervised the interns for Spring and Summer of 2002, discusses the program on behalf of Murray State University. B. Scott West, Directing Attorney for the Murray field office, describes what the internship brings to DPA. The students speak for themselves – selected excerpts from some final reports (the internship does have a writing requirement) are featured along with the other articles.

Today, a partnership of this magnitude between public defenders and public educators is unique, not only in Kentucky, but throughout the United States. Hopefully, this is a distinction that will not last forever – it is the dream of all of those involved in the intern program that DPA-MSU will become a model, or prototype, for future partnerships in Kentucky and elsewhere.

Valerie Moffitt assists Intern Keri Kemper with legal research

Matt Jaimet discusses a case file with Intern Sam Arnett

A Kentucky Department of Public Advocacy – Murray State University Partnership: The Criminal Justice Student Internship Program

"I had entered college with the notion that I was going to save the world by putting criminals in prison. At first, I was not altogether excited about the public defender's office. After all, weren't public defenders dim-witted, incompetent, lazy hacks who could not manage success in the private sector?" wondered Shane Beaubien, who served as an undergraduate intern for the Department of Public Advocacy during the fall semester of 2001.

Shane, a senior at Murray State University at the time, learned otherwise during his internship. An attorney who worked very closely with Shane described him as "an absolute asset to our office." She remembered his invaluable service on a particular case when the two of them sat with a client at the defense counsel table during a trial. "At the end of the day, after thirteen minutes of jury deliberation, Shane and I stood as we shared the joy of all our hard work when the jury announced our client "**NOT GUILTY.**"

Today, Shane is employed as an investigator at the Department's Murray Field office on the Murray State campus. Shane's story is similar to that of many of the thirty undergraduates who have served the Western Regional Office as student interns. Shane majored in criminal justice with the intention of becoming a police officer. In fact, the criminal justice program at Murray State recognized him as the "Outstanding Student in Law Enforcement" during 2000-2001. He decided to enroll in the internship class in order "to see how the other side works." Shane believed that he could learn to "avoid the kinds of mistakes which defense attorneys harp upon" and prevent the release of criminals for "technicalities." While working with public defenders, however, Shane noticed "errors in citations" and other mistakes by police and prosecutors. "People would have been punished for crimes more serious than those they had committed, or even worse, for crimes they did not commit," except for the efforts of the public defense team, he recalls. According to Shane, the internship was a transforming experience that altered his career aspirations as well as his perceptions of the entire criminal justice system.

Shane is the product of a unique partnership between the DPA and Murray State that began during the fall of 2000. As far as we know, the Murray field office is the only public defender office in the country that is located on a university campus. On August 31, 2000, Governor Paul Patton officially opened the office at a well-attended ceremony on a soccer field across the street from the DPA site. He praised Murray State's willingness "to serve Kentucky in a whole lot of different ways" and recognized that "the Department has offered the students at Murray State a unique opportunity to learn about and get hands on experience regarding today's criminal justice system." "If you happen to be in a situation where you have to go through the court system and you can't afford an attorney, it is vital if our system is going to work for all, [that] all have access to competent and adequate representation when they come before the courts of justice," the governor explained. The DPA-Murray State union benefits the Commonwealth of Kentucky by providing hands-on training for criminal justice undergraduate students and by helping alleviate personnel shortages in the public defender office.

To participate in the internship program, students must be juniors or seniors who are either majors or minors in criminal justice. Each student receives three hours of undergraduate credit for completing one hundred and fifty clock hours during a semester. They must also prepare an essay that details their experience with the DPA. Supervising attorneys write performance evaluation letters for the individual interns and submit reports to a criminal justice faculty member who assigns grades on a pass/fail basis. Students may enroll in the internship for an additional semester if they desire. In fact, of the thirty students who have participated thus far, five have served for two semesters.

The public defenders student internship is an asset to Murray State University in many ways. As with other internships, service with the DPA provides practical training in a criminal justice agency. DPA interns may investigate cases, interview defendants, victims, and witnesses, enter adult and juvenile jails and correctional facilities, serve subpoenas, and attend court. While the criminal justice program does not want interns to only perform clerical tasks, students necessarily learn the importance of paper work and assist staff with a variety of office duties. For most students, the internship provides their first extensive experience as criminal justice employees. Interns learn to communicate in person and by telephone with both professionals and lay persons who conduct business with the office. "People who call are [often] upset, frantic, or just plain rude," remarks one student.

For students who desire to pursue legal careers, the internship offers opportunities to view the judicial process at a close range, while working directly with practicing attorneys, and engaging in research. Aspiring law students receive insightful information from mentors who are able to help them prepare for professional school and life thereafter. But for the overwhelming majority of criminal justice students who will not become lawyers, the public defender internship nev-

ertheless presents opportunities and challenges that they would be unable to realize in the classroom. Public defenders deal with virtually every criminal justice agency that exists. The DPA must cooperate with prosecuting attorneys, police officers, probation and parole supervisors, juvenile justice institutions, corrections, social workers, and substance abuse counselors, as well as medical professionals and facilities. Regardless of one's career goals, the internship will place students in contact with all aspects of the criminal justice system.

By assisting DPA staff, students are able to apply their classroom training to the "real world." One attorney remarked that a particular intern successfully "conducted some interviews on his own, having learned the craft" in a Murray State interviewing and interrogation course conducted by Dr. Heather Perfetti, a former public defender. "After reading the contents of the interviews," the attorney noted, "we believed them to be so thorough that we did not see a need to follow up with our own questions." In addition, many students have reported improving their communication abilities by observing attorneys interview clients. "The internship showed me what to expect when I'm on the stand," a former intern observed, explaining that "the lawyers are great teachers." The public defender experience conveys "important life lessons, such as paying attention to details, looking beyond the obvious, and calculating consequences," recalls another student. Like Shane, several interns who initially voiced skepticism about public defenders have changed their attitudes as a result of their time with the DPA. No longer do they characterize public defenders as "overworked, underpaid, unmotivated, uncaring, poorly educated bottom of the barrel lawyers."

Above and beyond the specific skills that criminal justice students are able to hone while serving as interns, their closer view of the world of crime and offenders corrects many misconceptions that they may have held previously. "Some people who are arrested are truly innocent and some just need another chance," one intern concludes. "Criminals are human," another adds. "So much of the internship deals with life in general and how humans relate to one another." Some students describe the most difficult part of the internship experience as "observing juveniles who have grown up in an unfit environment, with no parental involvement and therefore turned to a life of crime." They also empathize with the frustration of defense counsel whose "clients may not listen to their advice" or who "do not believe that they are helping them." In fact, an intern notes, it seems that staff members deal with "ungrateful and uncooperative clients every day. Some defendants even go so far as to contend that "there is a conspiracy with the commonwealth attorney's office." Perhaps "because clients are pulling at them from every angle and expect them to do what they want immediately," one amused intern found "each person in this office to be unique; some people are crabby and mean when under stress, some smile at you and are nice."

Despite the daily vicissitudes of life in the public defenders office, Murray State students have gained immeasurably from the internship experience. Evaluation letters written by staff members can serve as endorsements for employment, law school, and graduate school. Indeed, like Shane, other interns have modified their career goals as a result of the internship. Prospective policemen have learned to be more efficient as have would-be prosecutors. A few students have decided that they would like to become lawyers. Others have honestly realized that "this would not be a profession that [they] would want to pursue." But all of our students have spoken favorably about the internship and the diversity that it entails. They especially value the "opportunity to experience all aspects of criminal justice in one office."

Indeed, the criminal justice faculty at Murray State University, including professors Mittie Southerland, Heather Perfetti, John Homa, and myself have enthusiastically embraced the DPA internship as have Murray State University presidents Kern Alexander and King Alexander. Unlike educational institutions that are situated in densely populated urban areas, universities in more remote settings encounter greater difficulties in developing an adequate number of suitable internship sites for criminal justice students. We welcome the public defenders' office on our campus and the highly trained

MSU's Criminal Justice Honor Society, Alpha Phi Sigma, sponsored the panel discussion on the death penalty. Panelists from l to r: Eileen Cano Stanford (wife of Kevin Stanford); Rev. Patrick Delahanty; B. Scott West; Franklin Robinson; Circuit Judge, William Cunningham;, and Commonwealth Attorney, G. L. Ovey

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professionals who broaden the educational horizons of our students by connecting them directly to the operations of the criminal justice system. B. Scott West, director of the Murray field office, has taken the time to prepare an extremely helpful manual for public defender interns. "It is a great tool to let you know what to expect from this internship," one student remarks. The manual is replete with considerable detail concerning every facet of criminal justice that the DPA staff encounters.

The Department of Social Work, Criminal Justice, and Gerontology at Murray State benefits in a variety of other ways from the public defenders alliance. DPA staff members serve as guest lecturers for our classes and are able to utilize their abundant contacts and resources to secure the services of other experts for our program. During April of 2002, for instance, B. Scott West and Tom Glover, the western regional manager, participated as a panelist and moderator, respectively, in a capital punishment panel discussion on our campus. Mr. Glover was able to involve 56th Judicial Circuit Judge William Cunningham, 56th Judicial Circuit Commonwealth Attorney G. L. Ovey, and the Reverend Patrick Delahanty, of the Kentucky Coalition to Abolish the Death Penalty. They served on a panel that also included Eileen Cano Stanford, the wife of Kentucky death row inmate Kevin Stanford, and Professor Franklin Robinson of the Murray State Department of English and Philosophy.

In September of 2002, Mr. Glover, Dr. Perfetti, two interns, and myself served on a panel at the Southern Criminal Justice Association in Clearwater, Florida where we discussed the DPA-Murray State partnership and student internships. There are plans to eventually provide office space for a DPA capital attorney who will be housed with the criminal justice faculty and conduct a death penalty seminar. Thus, we anticipate a continuing and expanding mutually beneficial relationship between the DPA and Murray State University.

Eileen Cano Stanford, wife of Kevin Stanford; MSU Assistant Professor, Paul Lucko; and DPA's Tom Glover, moderator, prior to the death penalty panel

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Impressed into Service: The Indenture of a College Student

Always looking for a metaphor, and believing that a military analogy is always apt when talking about the Department of Public Advocacy (better described as a "corps" than a "department"), I choose to compare the typical DPA-MSU intern to an 1800's merchant marine sailor "shang-hai'ed" into service by the Royal Navy. Maybe the sailor was on the dock hoping merely to get an inside peek at the warships floating the harbor, or hear some war stories from some of the King's navymen, all from a position of safety, never dreaming that he would suddenly be seized, taken out to sea, and then forced to engage the opposition, "for real." As the saying goes, "this is NOT a drill! All hands on deck!" The vessel's captain tosses a torch to the sailor and shouts "fire the cannon," unconcerned that sailor has never had battle experience. There is a war to be won.

Okay, melodrama aside, the interns who arrive at the public defender office really are surprised when they find out just how real and significant their contributions can be. The intern will be either a junior or senior, and therefore will have had at least two years of academia – learning theories, concepts and ideas pertaining to criminal justice. But this will likely be the first time that he or she will actually put that learning to use. Not for a grade, but toward a specific goal: the hopefully successful defense of a poor person accused of crime by the Government. The students are excited, anxious, and eager – and wholly unprepared for what is about to happen to them!

Intern Bridgett Owens preps transcript for a murder case

After orientation and the signing of confidentiality statements, the students are thrust head-first into the world of criminal defense of those too poor to afford a lawyer. There is legal research to be done and case briefs to be written. MSU's Overbey Law Library is there to be used, and interns will find it to be their office away from the office. All student work will be placed in the file, to aid the attorney in preparing the defense. For a few short months, the internship will come close to consuming their lives, or at least, their spare time outside of the classroom. The internship requires 150 hours of time – this works out to about 12 hours per week, roughly equal to the combined amount of classroom time for the rest of their

courses. This works out to lots of research, but there is time for other tasks.

There are client interviews and witness statements to be taken. Maybe last semester, an intern took "Interviewing and Interrogation." If she studied hard and paid attention in class, chances are she got an "A," a measurable reward for the hard work she put in. Now, she will put those skills to use out in the field interviewing an eye-witness to an event, without any objective signs that she is conducting a good interview. Shane Beaubien, current investigator for the Murray office and a member of the inaugural class of interns, acts as the drill sergeant for each incoming class of interns. He hands out the witness interview assignments and accompanies them on their initial interviews. However, she will soon find herself conducting an interview by herself; the attorneys are in court, Shane is several counties away on another job, and the witness is here, ready and willing to speak what he knows. There is no professor to grade her performance, or offer coaching. It is now or never. The intern conducts the interview, writes or types up the result, and places it into the file. The attorney will rely upon this work. Does the importance of doing a good job have to be restated?

Often, interns will be used as sounding boards – mock jurors, if you will – and will give their opinions about whether a witness sounds credible, or whether a defense will "fly." Sometimes an advocate can get so caught up in his theory of defense that he is unable to view it objectively. A layperson's view is then indispensable, and may be reduced to a writing and placed in the file, where the attorney will rely upon them in planning trial or settlement strategy.

Although it has not happened yet, an intern might conceivably become a witness in the event it becomes necessary to recount the prior truthful testimony of a once cooperative witness who now wants to renege on his statement in hopes of avoiding the witness chair.

Finally, interns provide an excellent "runner" service during rule days and trials. A countless number of times an intern has been able to retrieve copies of files, documents or statements from the office, the circuit clerk's office, or even from other attorneys, while the public defender is still busy in court. On rule days where there are multiple arraignments, an intern can be speaking with one new client while another is being arraigned, giving the office a "first contact" with the client within minutes of appointment. It cannot get quicker than that.

B. Scott West

Court officials have been very accommodating to interns. Some judges, recognizing that interns are de facto legal assistants to the lawyers, allow them to sit at counsel tables. Clerks quickly associate the interns with our office and bend over backwards to help them when they come do office business. Interns do their part to make the justice system run smoothly by being non-disruptive to the court process while they are there. We have never had an intern who did not appreciate the solemnity and formality of court, and conduct him or herself accordingly.

Along the way, there are some laughs, albeit, some of them nervous ones. Like the time one intern – an aspiring Kentucky State Police Trooper – came to the office wearing a KSP T-shirt, completely freaking out a client. (Subsequent interns probably never knew until now the *real* origin of the dress code.) For the most part, however, interning is a serious business; interns quickly realize that with this level of participation comes responsibility – *awesome* responsibility – and accountability.

Finally, the internship will end and the students will disperse, having lots of stories but no one to tell them to, because of their commitment to confidentiality. Soooo, they will be back. To follow up on the cases they worked on; to find out what happened to a client they interviewed; to relive the war stories that they are forbidden to release to the public. This is the culture of "Intern Alumni," where students are willing to volunteer one or two hours a week, under the same confidentiality requirements as before, so as to stay "clued in" to the criminal defense scene. The internship becomes a fraternity.

How long will this internship and fraternity endure? From the DPA's point of view, for so long as the client is benefited, which is conceivably forever. DPA's interest in this internship is focused squarely upon its mission to the indigent accused. By impressing quality criminal justice students into service, the ranks of the public advocate corps thereby swell, and more service is brought to the client.

To borrow from the United States Marine Corps, *Semper Fidelis.*

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In Their Own Words….
Interns Recount Their Experiences with DPA

It is a summer morning near the end of the week at the Murray Field Office. Molly is on the phone – again – with the subpoena compliance department of Cingular cell phone company, trying to impress upon someone in Washington State that the information subpoenaed a week ago is absolutely critical to an upcoming case. She doesn't know it, but this is only the third call of what will be over a dozen before the requesting attorney finally has the information in his hand, thankfully, two days before trial.

Chris is returning the files from the previous week's rule day to their proper places in the filing cabinet. It is routine, mundane work, but that's okay. The break is welcome. Yesterday, Chris sat at counsel table throughout an exhausting felony possession of a firearm case, where he served as a lawyer's assistant passing notes to the attorney, calming the client, and taking notes for the file in the event of an appeal.

John will not be in the office today. The office picked up a new case Monday in which some of the witnesses just so happen to live in John's part of the county, and he knows them. He is there now collecting information from them, fodder for the suppression motion which will be filed in the next week or so.

This is the summer 2002 class of interns, all of whom are about to finish their 150 hours and resume their class schedules in the fall. They have worked hard and enthusiastically the last couple of months, and have thoroughly enjoyed their peek behind the curtain at the public defender's office.

These are their stories…

John Alderdice

John Alderdice,
MSU Senior (Criminal Justice Major)

One of the first things I learned is that the purpose of the defense in a criminal trial is not necessarily to discover the truth, but to make sure that the prosecution is forced to prove the truth of a given allegation without violating the rights of the accused. After all, if the State finds and punishes the guilty without regard to the rights of the accused, what is to stop the State from punishing the innocent as well?…

I learned that while a harsh sense of humor is often necessary to avoid being overwhelmed by the stress of looking after the people who nobody will help, the people who work for the Department must care for these unfortunates a great deal or they will not last long in this line of work….

Many people do not understand the need for Public Advocates, adopting an attitude that the guilty deserve no representation while the innocent have no need of it. The more-informed people who actually work in the justice system know better….

Many people believe that the public advocates are in the business of arriving at a plea bargain as quickly as possible. Not so. The attorneys at DPA are interested in arriving at the best possible solution for the client. Often this means going to trial, and I have observed that the attorneys are eager to litigate whenever they feel they can help their client in this matter. If a plea of guilty is in the best interest of the client, so be it. But the fact of the matter is that the attorneys will treat each individual case in the manner most beneficial for the defendant whether it means more work or not.

Molly Henshaw, MSU Senior (Criminal Justice Major)


Molly Henshaw

The hands-on activities that I was allowed to perform will definitely help me in law school. The attorneys that I worked with patiently answered every question I had, and made sure that I had a complete understanding of the task I was performing. Instead of answering phones and filing papers, I was interviewing clients and witnesses…

I knew that there were a lot of less fortunate people in the world, but I had no idea…. I saw some cases that would break my heart, while others would absolutely disgust me. These attorneys have to deal with sad situations on a daily basis. To be a criminal defense attorney, especially a public defender, one must learn to leave the work at the office. If not, the job would be far too depressing to handle….

I was also able to sit in on several trials. The first trial that I observed was one that I helped to investigate. In my opinion, the evidence leaned toward a "not guilty" verdict, but the jury did not seem to share that opinion.…

I've learned that criminal defense is a field that I definitely want to pursue…the [DPA] attorneys do it because they believe that every citizen deserves competent counsel, and a good defense. That is an admirable quality, and one that I hope to possess.

Christopher Schwerdtfeger, MSU Senior (Criminal Justice Minor)

[The lawyers] taught me that the law was not only about what is right and what is wrong, but also about was is fair and just….

I was asked to interview a client and witnesses in an intimidation of a witness case set for trial in September. I learned a very good lesson in diplomacy and interviewing.

I would suggest this internship to anyone considering going into any area of criminal justice. If someone is thinking about becoming a lawyer (defense, prosecutor, or otherwise) this internship offers good advice and great experience. If someone is considering going into law enforcement, this internship can show you the proper way to do things (not to mention ways *not* to do certain things)…

Sakae Harris, MSU Junior (Criminal Justice Major)

The first time I journeyed to the jail to deliver case discoveries I couldn't stop eating my fingernails or keep my stomach from swimming…

The office phones ring all the time and the attorneys have stacks of files on their desks. The workload is unbelievable and it seems the load grows…

One of my tasks was to write a shock probation motion – the attorney showed me an actual example and allowed me to draft the motion itself. I gathered the client's file and studied it – it was interesting writing the motion for someone for whom you have developed a clear understanding of his actions…

My inspiration is still very much to become an attorney and this internship is only feeding my desires. I love helping people especially in hard times. I would like to work as a public defender for at least three to five years. The experience is unbelievable. Public defenders are in court all the time….■

American Council of Chief Defenders (ACCD) Ten Tenets of Fair and Effective Problem Solving Courts

Introduction

"Problem Solving Courts" are spreading across the country. Though the current wave of interest started with the creation of Miami's Drug Court in 1989, the nation's courts had a long prior history of seeking to solve the problems of offenders and communities through the imposition of sentences with rehabilitative conditions or indeterminate sentences with a chance for early release based on rehabilitation. The advent of mandatory minimums and determinate sentencing foreclosed many such options, leading to the establishment of Problem-Solving Courts as a new vehicle for effecting established rehabilitative objectives.

There currently are more than 500 drug courts operating, and more than 280 others currently in the planning process, in all 50 states. Although drug courts have existed the longest and been studied the most, "Community Courts," "Mental Health Courts," and other specialty courts are beginning to proliferate.

Despite Department of Justice and other publications that urge inclusion of defenders in the adjudication partnerships that form to establish "Problem Solving Courts," the voice of the defense bar has been sporadic at best. Although defense representation is an important part of the operation of such courts, more often than not, defenders are excluded from the policymaking processes which accompany the design, implementation and on-going evaluation and monitoring of Problem Solving Courts. As a result, an important voice for fairness and a significant treatment resource are lost.

The following guidelines have been developed to increase both the fairness and the effectiveness of Problem Solving Courts, while addressing concerns regarding the defense role within them. They are based upon the research done in the drug court arena by pretrial services experts and others and the extensive collective expertise that defender chiefs have developed as a result of their experiences with the many different specialty courts across the country. There is not as yet, a single, widely accepted definition of Problem Solving Courts. For the purposes of these guidelines, Problem Solving Courts include courts which are aimed at reducing crime and increasing public safety by providing appropriate, individualized treatment and other resources aimed at addressing long-standing community issues (such as drug addiction, homelessness or mental illness) underlying criminal conduct.

The Ten Tenets

1. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in the design, implementation and operation of the court, including the determination of participant eligibility and selection of service providers**. Meaningful participation includes reliance on the principles of adjudication partnerships that operate pursuant to a consensus approach in the decision-making and planning processes. The composition of the group should be balanced so that all functions have the same number of representatives at the table. Meaningful participation includes input into any on-going monitoring or evaluation process that is established to review and evaluate court functioning.
2. **Qualified representatives of the indigent defense bar shall have the opportunity to meaningfully participate in developing policies and procedures for the problem-solving court that ensure confidentiality and address privacy concerns**, including (but not limited to) record-keeping, access to information and expungement.
3. **Problem solving courts should afford resource parity between the prosecution and the defense.** All criminal justice entities involved in the court must work to ensure that defenders have equal access to grant or other resources for training and staff.
4. **The accused individual's decision to enter a problem solving court must be voluntary.** Voluntary participation is consistent with an individual's pre-adjudication status as well as the rehabilitative objectives.
5. **The accused individual shall not be required to plead guilty in order to enter a problem solving court.** This is consistent with diversion standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 3.3 at 15 (1995). The standards stress, "requiring a defendant to enter a guilty plea prior to entering a diversion program does not have therapeutic value." Id.
6. **The accused individual shall have the right to review with counsel the program requirements and possible outcomes. Counsel shall have a reasonable amount of time to investigate cases before advising clients regarding their election to enter a problem solving court.**
7. **The accused individual shall be able to voluntarily withdraw from a problem solving court at any time without prejudice to his or her trial rights.** This is consistent with the standards adopted by the National Association of Pretrial Services Agencies. See Pretrial Diversion Standard 6.1 at 30 (1995).
8. **The court, prosecutor, legislature or other appropriate entity shall implement a policy that protects the accused's privilege against self-incrimination.**
9. **Treatment or other program requirements should be the least restrictive possible to achieve agreed-upon goals. Upon successful completion of the program, charges shall be dismissed with prejudice and the accused shall have his or her record expunged in compliance with state law or agreed upon policies.**
10. **Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client, including the right to discovery, to challenge evidence or findings and the right to recommend alternative treatments or sanctions.** ■

Winning Without Combat: A Plea Bargaining Primer

Robert Stephens

In the preface to his translation of Sun Tzu's ancient classic, *The Art of War*, Thomas Cleary recounts the story of a Chinese lord who asked his personal doctor which member of the doctor's family of physicians was the most skilled. "The physician, whose reputation was such that his name became synonymous with medical science in China, replied, 'My eldest brother sees the spirit of sickness and removes it before it takes shape, so his name does not get out of the house. My elder brother cures sickness when it is still extremely minute, so his name does not get out of the neighborhood. As for me, I puncture veins, prescribe potions, and massage skin, so from time to time my name gets out and is heard among the lords.'" (Translator's Introduction, Shambhala Publications, 1988, 1). According to Cleary, the message of this story is the very essence of Master Sun's strategic classic: The greatest warrior wins without fighting, just as the greatest healer prevents disease from ever taking form. *Id.*, 1-2. As Master Sun himself wrote, "Therefore those who win every battle are not really skillful – those who render other's armies helpless without fighting are the best of all." *Id.*, 67.

As lawyers, we engage in a business of conflict; the very nature of an adversarial process is disagreement leading to confrontation. The weapons of law may not be physical, but they are no less real for their immateriality. As with other situations involving conflict, the best solution to a criminal case can come before the real fighting begins; in our case, before trial.

Resolution of cases at the pretrial level constitutes an overwhelming percentage of our total caseload. According to a study conducted by the U.S. Department of Justice, nationwide in state court (the 75 largest counties) and federal district courts, 9 out of 10 cases were settled prior to trial. (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Special Report, "Defense Counsel in Criminal Cases," Caroline Wolf Harlow, Ph.D., BJS Statistician, November 2000, 1).[1] Despite the huge number of cases settled before trial, however, the disciplines and tactics of pretrial negotiation receive comparatively little attention in criminal defense training.

Indeed, plea bargaining is often treated as a kind of dirty secret among criminal defense attorneys. The idea that by pleading a client guilty one is somehow engaging in inappropriate behavior has found its way into our professional consciousness. This is true despite the establishment of the practice's legitimacy by the United States Supreme Court over 30 years ago (in *Santobello v. New York* (1971)). (J.W. Peltason, *Corwin & Peltason's Understanding the Constitution*, 13th Ed., Harcourt Brace & Company, 1994, 278-79). It is this negative view of plea negotiation that has led to that immortal misnomer, "*flea* bargain." Perhaps adding to our ill perception of plea bargaining is the realization that without it, what flow exists in the criminal justice system would grind to an unproductive halt. It is troubling to perceive yourself as part of a judicial machine cranking out convicted persons; regardless of how important it is that individuals going through the machine get the best possible treatment upon exiting.

Every attorney would like to win at trial, but what if the facts of the case make that virtually impossible? For the good of the client, a jury trial may not be the best way to resolve the case. Consider the difference between serving a minimum 85% on a 20 year sentence, after an assault first jury trial, and being eligible for parole after only 20% of a 10 year sentence for assault second, per a carefully negotiated plea agreement.

Plea negotiation is the process whereby we, as defense attorneys, engage our efforts to obtain the best possible pretrial resolution to our client's case. Good plea negotiation is an active endeavor, and is not the result of a beneficent or witless prosecutor. Furthermore, despite what dim view others may cast upon it, effective plea bargaining can mean everything to your client's future welfare. Good plea negotiation starts with knowledge, knowledge of the persons and institutions with whom you must deal in the criminal justice system; and develops through the application of strength and reaction to counterforce. We will examine each of these points in turn.

Preparing to Negotiate: Know the Enemy, Know Yourself, Know the Land

The foundation of any successful plea negotiation is knowledge. To again quote Master Sun's ancient treatise on conflict, "So it is said that if you know others and know yourself, you will not be imperiled in a hundred battles." *The Art of War*, 82. Not only must you know yourself and your opponent, you must understand the legal terrain upon which the battle is waged. "The contour of the land is an aid to an army." *Id.*, 145. To engage effectively in plea bargaining, you must know your opponent, know yourself, and know the land.

A. Know Your Opponent

To negotiate effectively, you must know the opponent. You may have a cordial relationship with the friendly local prosecutor, but the fact remains, in terms of negotiating a plea agreement, the prosecutor is the enemy. The adversarial na-

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ture of the criminal justice system does not change because you are friendly to, or even friends with, the prosecutor. When negotiating on behalf of your client, you can neglect neither the conflict at the heart of the process, nor your adversarial role. As we will explore, however, there are steps we can take to improve the process of negotiation, building a better working relationship with the prosecution, for the benefit of our clients.

The better you know the prosecutor the better you are able to successfully navigate the bargaining process. Perhaps you will have a clearer idea of the prosecutor's opinion of the Commonwealth's case. You have, after all, seen he or she deal with very good and very bad cases in the past. Also, your prosecutor may have a "soft spot" for clients who are themselves, in a matter of speaking, victims. The prosecutor in your jurisdiction may not view certain kinds of cases as particularly serious, or may prosecute other types with extra vigilance. The particulars are endless, but the better you know the reactions, opinions, beliefs, and tactics of your prosecutor, the stronger you will be while negotiating with that person. There is nothing duplicitous about simultaneously having a good working relationship with the prosecutor who is, from a systemic point of view, your adversary. You can use that relationship, not in the negative sense of abusing it, but the positive sense of utilizing better relations for the benefit of your clients. Furthermore, you would be sorely mistaken to believe the prosecutor is not constantly watching you, for example, for clues about the strength of your case!

A good working relationship with the prosecutor will only improve the results of your negotiation process. Indeed, the greater the substantive disagreement between parties, the more a good working relationship is needed. Roger Fisher and Scott Brown, *Getting Together: Building Relationships as We Negotiate*, Penguin Books, 1988, 36. Fisher and Brown lay out a strategy for more successful negotiation which is independent of disagreement, concessions, partisan perceptions, reciprocity, and permanent "sides". *Id.* A good negotiation strategy should not depend upon the parties agreeing on every substantive issue (that is, after all, why we are negotiating!); it should not be purchased with one-way concessions; it should not depend on the other negotiating partner reciprocating; and finally, a good negotiation strategy should move beyond our own perceptions of the conflict, to see the other's point of view, and should not permit us to see the other negotiating partner as permanently opposed to us on all issues. *Id.* As an example of the final point, the prosecutor who is intransigent in one case, insisting on the maximum punishment for your client, may under different factual circumstances be quite willing to accommodate your client's objectives. The goal is to view each negotiation individually, while operating within the framework of a good working relationship with the other negotiating partner, the prosecutor. Fisher and Brown provide a usable model for obtaining that good working relationship, through an unconditionally constructive strategy. This strategy is outlined in the table below.

An Unconditionally Constructive Strategy

Do only those things that are both good for the relationship and good for us, whether or not they reciprocate.

1. **Rationality**. Even if they are acting emotionally, **balance emotions with reason**.
2. **Understanding**. Even if they misunderstand us, **try to understand them.**
3. **Communication**. Even if they are not listening, **consult them before deciding** on matters that affect them.
4. **Reliability**. Even if they are trying to deceive us, neither trust them nor deceive them; **be reliable**.
5. **Noncoercive modes of influence**. Even if they are trying to coerce us, neither yield to that coercion nor try to coerce them; **be open to persuasion and try to persuade them**.
6. **Acceptance**. Even if they reject us and our concerns as unworthy of their consideration, **accept them as worthy of our consideration, care about them, and be open to learning from them.** *Id.* at 38.

This strategy has obvious common sense application to the negotiation process, and has the notable advantage of being applicable whether or not the other partner is reciprocating. As the authors themselves point out, the Golden Rule is not based on the premise that if you behave as the other person would like, you can "safely predict" the other will behave likewise. *Id.*, 32. Nonetheless, my pursuing such a strategy benefits myself and my position. Fisher and Brown's method comes from a "selfish, hard-headed concern with what each of us can do, in practical terms, to make a relationship work better. The high moral content of the guidelines is a bonus." *Id.*, 38. For example, I should be reliable in my plea negotiations, whether the prosecutor chooses to be, or not. When my client decides at the last minute to seek to withdraw from the plea agreement, I must consider my reliability in the eyes of the prosecution. Future clients could be harmed by assisting my client in his choice. I should consider this even if the prosecutor regularly tries to back out of tendered offers under pressure from alleged victims or police officers who do not approve of the government's offer.

A note needs to be made regarding Fisher and Brown's methodology and some contentions made in this article. A fundamental postulate of this article is that an adversarial conflict is the basis of all criminal negotiation, yet the authors of *Getting Together* recommend use of non-coercive methods during negotiation. How can these two seemingly opposite ideas be advanced in the same article? Despite the superficial discrepancy, a closer look at what Fisher and Brown are really saying will dismiss this apparent divergence. The adversarial relationship inherent in criminal plea negotiation does not change because I have a good working relationship with my opponent, the prosecutor. To the contrary, persons,

institutions, and countries with great substantive differences must at some point choose to work together through negotiation, ideally with the advantage of a good working relationship.

The point Fisher and Brown make is that we can, despite our differences, improve the process, the methodology, of negotiation. For instance, a topic raised subsequently in this article is the application of leverage and bargaining position in negotiations. Fisher and Brown's method does not deny the reality that parties enter, conduct, and leave negotiations with different strengths of bargaining position. What they do enjoin is the use of coercive methods. Leverage and bargaining position (without pointing them out or specifically calling attention to them) are still an essential part of negotiation, but an effective negotiator should avoid bullying tactics and actual threats. Instead, the effective negotiator should improve his or her walk-away alternative. *Id.*, 146-48. The difference is not semantic, but methodic: do we try to coerce the other partner by articulating threats, or do we persuade by strengthening our negotiating position, counting on the other partner to count his or her risks in light of our position should we decide to walk away from the negotiation table?

B. Know Yourself

Knowing the enemy's temperament, designs, position, and strength without a similar awareness of your own is perilous. The plea negotiator must understand himself or herself. Knowing yourself, in this context, means understanding not only your own strengths and weaknesses, but also your case and client.

1. Your "Self." The beginning of successful plea negotiation is an understanding your own self, as an attorney. What are your legal strengths and weaknesses? Are you good at conducting cross-examination in trial, or are you better at preserving and litigating purely legal issues? Are you skilled at the techniques of voir dire, but not-so-great at conducting direct examination of your own witnesses? Every criminal defense attorney arrives on the legal battlefield skilled to a greater or lesser degree in the various areas of defense practice. While the lifetime of legal education involves a continual striving for refinement in areas where you may be more or less skilled, the criminal defense attorney must consider his or her current strengths and weaknesses when approaching any case. This is not any different in the plea negotiation process. Evaluating your bargaining position must begin with a realization of what particulars of criminal defense practice you find easier and those you do not. The methods or approaches, the legal attacks, you choose to use in seeking a desirable plea offer will be grounded in the areas of defense practice you find most reliable.

2. The Case. Successful negotiation requires knowledge of the case. The better you know the facts of the case (especially vis-a-vis the prosecutor) the greater will be your negotiating position. Knowledge about the case must be as accurate, and complete, as possible. We cannot always rely upon the information provided by the Commonwealth through discovery. Good work by persons trained in the investigative field is invaluable for preparing to negotiate a plea bargain. You may need the assistance of experts in scientific or technical fields to properly prepare for the negotiation process. For example, you may need an expert's opinion on the client's competency before you can even discuss the plea offer with the client. Simply, the more reliable information you have about the case, the greater your bargaining power will be because you will more clearly grasp the risks and strengths of the case.

3. The Client. Knowing yourself also means knowing your client. Particularly for criminal defense practitioners, knowing your client is possibly the most important precursor to negotiating. There are essentially four points that make up knowing your client.

First, on the most basic level, knowing your client is part of knowing the case. Knowing your client tells you whether the client can or should testify, what kind of presence he or she will have in court, and what statement(s) the client has given. Knowing your client gives you knowledge of the one area of the case where you can guarantee the jury's attention will be riveted: your client's actions before and during trial.

Second, you will have to explain the tendered deal to the client, including the ramifications (for example, that pleading guilty to a felony means the client cannot possess a firearm for the rest of his or her life). Your client must also know the risks and potential benefits of trial. This prepares the client to make the decision upon which you can only advise: whether to take the Commonwealth's offer.

Third, knowing your client, having established a positive relationship (or at least an understanding) with him or her, prepares the client to heed your advice. This is sometimes difficult, for some clients can be unwilling to cooperate. However, the more you can enable the client's trust, by being upfront and keeping open the lines of communication, the easier it will be when the client must listen to your advice about whether to accept the plea offer. Making the client aware of the vicissitudes of the negotiation process decreases the risk of backlash from the client against the well-bargained agreement once it is ready for approval, or even after nominal acceptance. As one of this century's foremost practitioners of the negotiating art has said:

> [T]hose who are excluded from the ebb and flow of negotiations feel free to give expression to the fantasy of a negotiation in which all the concessions are made by the other side, and in which…[their own side's] concessions could have been avoided had *their* advice been solicited. (Henry Kissinger, *Diplomacy*, Simon & Schuster, 1994, 744).[2]

One of the greatest dangers in plea negotiation, that the client will "bow up" and refuse to take the deal you have spent so much time creating, can be avoided by giving the client no

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reason to feel excluded from the negotiation process. The implication for public defenders is particularly acute, because indigent clients may already feel they are represented by a member of the "system" which has charged them with criminal activity. Forestalling the client's objections to supposed "back-door dealing" is thus one of the foremost objectives of the public defender in plea negotiation.

Fourth, knowing your client involves knowing your client's objectives. Most clients would prefer a dismissal or acquittal, but the facts may make that unlikely, and it is then important to clarify your client's objectives. Your advice is vital in this regard. Some clients will snatch up any offer of probation, despite the utter impossibility of their successfully completing the same. Such clients need guidance and advice in defining realistic goals in light of their situation. The client who cannot complete probation may need a sentence of time to serve. The focus should be on defining, with the client, reasonable, obtainable goals to guide your negotiation. Does he or she need merely to stay out of jail, or is the objective to get the shortest jail sentence, with guaranteed probation of less importance?[3]

The more finely you can hone your client's objectives for the negotiating table, the greater your chances at actually obtaining them. For one, you will have a clear idea of what you are seeking from negotiation. For another, those who negotiate with singular (or relatively few) objectives, can only fare better during negotiations than those with numerous objectives. *Id.*, 687. Since negotiation involves trading concessions the more objectives one has, the more one will have to concede to obtain those goals. *Id.*, 744. The party with fewer objectives will of necessity fare better in the give and take of bargaining.

In closing on the issue of knowing you client, it is not difficult to see the applicability of Fisher and Brown's process to interacting with our relationship partner, the client. The degree to which we can improve our working relationship, by improving the method of interaction with our clients, cannot hurt and may improve the client's response to our advice. It will certainly benefit us, in a professional (especially ethical) sense, to be reliable, communicative, understanding, persuasive rather than coercive, emotive or logical as appropriate, and accepting in dealing with our clients. Doing so will benefit the client in understanding our advice and ultimately deciding whether to make the informed choice to follow the advice or not, but will also improve the quality of our advice.

C. Know the Land

In legal warfare, including pretrial negotiation, you must know the legal landscape. This requires an understanding of the persons within the criminal justice system (beside your opponent) with whom you must work. In terms of plea negotiation, counsel must understand the judges and juries of the jurisdiction.

To negotiate well, you must know the trial judge. The outcome of pretrial motions can in some instances be foreknown by carefully observing the judge's rulings with similar cases and motions. The same is true for rulings on objections at trial. The very outcome of trial can be effected by the actions of the trial judge. It is wise to remember the words of that able defense attorney, John Adams, who quoted Hume in saying, "While so many terrors hung over the people, no jury durst have acquitted a man when the court was resolved to have him condemned." John Adams, Letter to the Printers Dated January 18, 1773, Reprinted in Chapter 6, "The Independence of the Judiciary; A Controversy Between William Brattle and John Adams," *The Revolutionary Writings of John Adams*, Liberty Fund, 2000, 83.

Understanding the inclinations of the trial judge can, and should, affect our approach toward plea negotiation. For example, if the trial judge is likely to overrule your motion to suppress evidence, you must consider this while negotiating. You should challenge the evidence, and then if the offer is unacceptable to your client, go to trial with the issue preserved. But, to not consider the judge's probable rulings when assessing the desirability of an offer is folly. You can challenge bad conduct or evidence while understanding that at the trial level you will probably lose. If, however, the best interest of a current, immediate client favors taking a good deal rather than charging forward on some crusade for the client on an ethereal, rights-driven level, or for unseen, future clients, the client's well being must guide our choice. You can attempt to change bad judicial behavior, but, while working out a plea agreement, to behave as if it does not exist is a serious mistake.

The plea negotiator must also know the inclinations of the next tier of judges in the jurisdiction, those who will be hearing issues raised on appeal from the trial level. The opinions rendered by the appellate court can affect bargaining position drastically. Suppose the appeals judges tend to disfavor search and seizure claims: your bargaining position is thereby lowered in any case where you have a legitimate Fourth Amendment issue. The specific issue and makeup of the appeals court will, of course, vary. The point is, to fully understand the judicial landscape upon which you fight, you should know the appellate court's whims and fancies, just as you know those of the trial court.

Equally important to effective plea negotiation is understanding the juries within the jurisdiction. There are exceptions to any broad generalization, but every area's jury base has a certain tenor, a slightly different temperament than those in surrounding communities. One county may have jurors with more temperate values toward alcohol consumption than the next county over. The jurors in one county may tend to require the government to put on its proof, while jurors from the neighboring circuit almost never acquit. Even within a jurisdiction, persons from different parts of the county, or city, may render verdicts quite differently. The aim for counsel is to understand the jury population with which he or she

operates. Knowing this allows counsel to better predict the possible outcome at any given trial, with an obvious effect on bargaining power and objectives in plea negotiation.

The Negotiation Process: Applying Strength and Trading Concessions within a Working Relationship

Criminal pretrial negotiation must be approached with a proper understanding of the adversarial nature of the process. A good model for criminal negotiators is that of conflict among nations. Carl von Clausewitz, in his classic on the theory of war, declared negotiation has to do with merely threatening the enemy, but still identified this as a kind of warfare. (*On War*, Edited with an Introduction by Anatol Rapoport, Penguin Books, 1968, 401).[4]

With the proper understanding in mind, negotiation has a lot to do with leverage and the implied (but never verbalized) threat of force. The willingness of an adversary to negotiate seriously may hinge directly on your willingness to apply pressure. "Typically, it is pressure on the battlefield that generates the negotiation." (*Diplomacy*, 488). Take, for example, the Nixon administration's action of attacking within Cambodia and Laos to eliminate North Vietnamese supply bases in 1970-71, which along with mining North Vietnamese harbors, renewed bombing of North Vietnam, and defeat of a 1972 North Vietnamese offensive, led directly to the success of America's withdrawal from South Vietnam. *Id.*, 692-93.

Bargaining, then, is about making concessions, when necessary to reach your objectives, while always strengthening and utilizing advantages to the benefit of your client. In the case of criminal defense counsel, the threat of force means the threat to the prosecution of an acquittal, suppressed evidence, or a reversal on appeal.

As we have already discussed in regard to building a good working relationship with the prosecution, this is not to say there are no cooperative moments. You and the prosecutor may be able, in a given case, to reach a genuine agreement regarding what justice requires. Your client, for example, may be a good candidate for pretrial diversion or even dismissal, and the prosecutor agrees. This, in fact, is the very nature of "détente": cooperation existing in some areas can be used as leverage to effect change where disagreement continues. *Id.*, 714. Here is where an erstwhile good relationship with the local prosecutor can sometimes come to the aid of your client. Also, perhaps the prosecutor agrees that your client is the least culpable out of several co-defendants, and has from the start offered your client the minimum time, to serve. This agreement on the client's relative culpability provides an opportunity for your client to obtain the offer of probation he seeks. There will be a direct correlation between the health of your working relationship with the prosecutor and the quality of product from your negotiations. The point is not to lose sight, in the midst of agreement, of the adversarial process, and thus forget your position as advocate for your client.

A common mistake arising from misunderstanding the true nature of negotiation has to do with making unilateral concessions. Since negotiation is largely about making concessions in trade for obtaining objectives, with force or the implied threat of force being applied for leverage, it is *utterly foolish* to make one-way, unilateral concessions in hopes of somehow gaining bargaining power by fostering good will in the opponent. The more likely result of unilateral concessions will be to entice the enemy to hold firm, making no concessions, waiting for you to make further unilateral ones. *Id.*, 488.

> [I]n most negotiations, unilateral gestures remove a key negotiating asset. In general, diplomats rarely pay for services already rendered- especially in wartime…Relieving…pressure reduces the enemy's incentive to negotiate seriously, and it tempts him to drag out the negotiations in order to determine whether other unilateral gestures might be forthcoming. *Id.*

Indeed, why should an adversary concede some point of importance when you are willing to give up points for free?

Two episodes in the history of international diplomacy in the 20th century illustrate this point. The classic and oft-noted example is the blunder made by Prime Minister Neville Chamberlain of Great Britain in 1938. At the Munich conference, Chamberlain made unilateral concessions with Adolf Hitler, believing he could thus appease the crafty tyrant into foregoing a more general assault on Europe. (*Getting Together*, 21; *Diplomacy*, 313-16). The destruction wrought upon the world after that failed attempt to buy peace with unilateral concessions makes the point better than any rhetorical argument.

Consider also the decision by the Johnson administration to unilaterally cease bombing North Vietnam in March of 1968. The effect was to weaken the United States' position vis-a-vis the North Vietnamese, both at the bargaining table and militarily, while gaining only a superficial victory: what amounted to merely procedural negotiations. (*Diplomacy*, 672-73).

The obverse is also true: negotiation requires a willingness to bend, to concede on some relatively minor points in order to gain the main objective. Just as we should not unilaterally give away bargaining points, we cannot expect the other side to do so. A necessary first step is to determine, as noted above, your client's most important objective(s), shaving away through negotiation those of lesser value as necessary to obtain the ultimate goal. For example, if your client's objective is to stay out of jail at all costs and the prosecution's offer is for relatively low jail time, the government standing silent on probation; you might agree to more and more jail time if revoked in trade for the government agreeing to probation. One is mindful to note, however, that a common prosecutorial bargaining tool is offering long prison terms

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with probation guaranteed, knowing that many defendants will seize the offer of probation when they have little to no chance of successfully completing the probationary requirements. This, again, is where your assistance defining proper negotiating goals is vital.

One way to prepare for negotiation is to apply force, or the implied threat of it, by preparing well for trial. Many a defense attorney has made a non-frivolous motion to suppress evidence, knowing he or she will lose at the trial court level, because the issue has thus been preserved for appeal, which places pressure on the prosecutor to yield, despite the prosecution's immediate victory. After such force has been applied, the prosecutor is more likely to tender a better plea offer.

A major threat of force by defense counsel is not only to make good pretrial motions, but a mere willingness to proceed to trial. A great deterrent for combat is willingness by the defender to fight if pressed. Taking a few cases to jury trial is one of the best preparations for obtaining leverage over the prosecution. This is especially true when you are winning trials. But even losing verdicts come after long trials, which require effort from the prosecutor and contain at least some risk of reversal on appeal. Simply demonstrating your willingness to fight, to go to trial, has a powerful influence on your bargaining position in subsequent cases.[5]

Conclusion

Pretrial negotiation is one of the most important skills of the criminal defense attorney; this would hold true even if pretrial resolution did not account for over 90% of case resolutions nationwide. Indeed, because of the overwhelming number of criminal cases settled prior to trial, we cannot be strategic masters of the criminal defense field unless we understand pretrial negotiation. By studying what we must know to be ready to negotiate, and the methods of negotiation, counsel can become that greatest of legal warriors, the one who wins without fighting.

1. Case Disposition	Public Counsel	Private Counsel
75 Largest Counties		
Guilty by Plea	71.0%	72.8%
Guilty by Trial	4.4	4.3
Case Dismissal	23.0	21.2
Acquittal	1.3	1.6
U.S. District Courts		
Guilty by Plea	87.1%	84.6%
Guilty by Trial	5.2	6.4
Case Dismissal	6.7	7.4
Acquittal	1.0	1.6

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Special Report, "Defense Counsel in Criminal Cases", Caroline Wolf Harlow, Ph.D., BJS Statistician, November 2000, 1.

2. Henry Kissinger's insights into international relations and diplomacy have remarkable application to negotiation of all kinds, including criminal pretrial negotiation. As Mr. Kissinger would no doubt agree, however, the applicability of comparing one situation to another is a matter of independent judgment: "The study of history offers no manual of instructions that can be applied automatically; history teaches by analogy, shedding light on the likely consequences of comparable situations. But each generation must determine for itself which circumstances are in fact comparable." (*Diplomacy*, 27).

3. Here arises the question: how do we define success short of trial? You must determine with your client what he or she seeks to obtain, in light of the facts and circumstances of the whole case. A resolution without the concomitant stress and public airing of jury trial, may alone be a victory for many clients. Because of the tendency of some police and prosecutors to overcharge, your goal in plea negotiation may be a guilty plea to a charge more accurately fitting the facts presented. Alternatively, your client may be appropriately charged, but a guilty plea offers an outcome, in terms of sentence length and opportunity for probation, that is better than that likely at trial. You may seek a plea where a mentally ill, but technically competent, client receives some sort of treatment rather than pure incarceration. Your client may wish to protect a co-defendant (such as a spouse) by taking a guilty plea. You may seek to bar, on Double Jeopardy grounds, later charging and indictment. You may want to avoid a felony conviction. Your client may simply want out of jail, and a guilty plea will get him out, today. (Clients' priorities can shift when out on bond, as is discussed more fully in endnote v.). Defining success in negotiation is a complex issue, the ramifications of which are best left to the particulars of case and client.

4. Since the Anglo-American legal system is an adversary system, in which "active and unhindered parties contest…with each other to put forth a case before an independent decision-maker" (*Black's Law Dictionary*, 7th Ed., 54), using competing nation states as a paradigm to understand competing legal parties is at least feasible. As in the international arena, where countries vie for supremacy, in the legal world selfish parties fight to determine which party is factually and legally correct.

5. A final point is the impact of bond on bargaining power. A client sitting in jail will often take the tendered deal more readily than one who is free on bond. The reason is simple: the client in jail has less bargaining power; he or she has one less bargaining chip (his freedom) with which to deal. The client's morale and strength to resist are greater if he or she is out on bail, surrounded by the support of family and friends. Also, the client on bail increases bargaining power by his or her ability to assist counsel in finding witnesses, observing the crime scene, and otherwise preparing for trial. Getting your client a bond he or she can make, as quickly as possible, is thus a powerful boost to your bargaining position. ■

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PLAIN VIEW . . .

Ernie Lewis, Public Advocate

Hughes v. Commonwealth
Ky., 87 S.W.3d 850 (2002)

The mother of Keisha Hughes reported to the police that she had not seen her daughter in 2 days, and that her daughter had failed to pick up her children. The police went to an apartment Hughes shared with Troy Hughes, the defendant. Troy told the police that his wife was asleep in the apartment and did not want to be disturbed. Later that morning, another officer went back to the apartment and knocked on the door, receiving no answer. Because the officer smelled something foul, he asked the apartment manager to let him into the apartment. When he did so, the officer found the dead body of Keisha Hughes. Troy Hughes was arrested for her murder. Troy later filed a suppression motion alleging the warrantless entry into his apartment had been illegal. The trial court overruled the motion, and Troy Hughes appealed.

The Kentucky Supreme Court affirmed the trial court in an opinion by Justice Cooper. The Court held that the evidence was admissible on two grounds. First, the Court held that the second officer could enter into the apartment without a warrant due to the existence of exigent circumstances. "Dials had information that the victim had been reported missing for two days and that she had failed to pick up her children after leaving them with relatives in Louisville; that she and Appellant had experienced marital problems; that Appellant had refused Officer Varney's earlier request to see the victim on the excuse that she was asleep; and that when Dials returned to the apartment, no one answered his knock on the door and an unusual odor was emanating from inside the apartment. This was substantial evidence supporting the trial judge's finding that Dials had a reasonable belief that Keisha Hughes might be inside the apartment and in need of emergency assistance."

The Court also found that the evidence was admissible under the inevitable discovery doctrine. The victim's brother testified that he arrived at the apartment and found Officer Dials there, and that if Dials had not already entered, the brother would have. Thus, the body would have been inevitably discovered irrespective of the warrantless entry by Officer Dials.

Priddy v. Commonwealth
2002 WL 31398739
Ky.App., Oct. 25, 2002.
(Not Yet Final)

Officer Michael Koenig of the Jefferson County Policy Department was pulled over by an anonymous person who told him that a "narcotics transaction" was occurring at a nearby K-Mart parking lot. The person told Officer Koenig that a white male, 6' tall, weighing 150-170 pounds with "curly, shoulder length, black hair," driving a late 1970's black Ford pickup truck with primer on the hood was the person who was selling narcotics. Office Koenig went to the parking lot and saw a person fitting the description. As the truck left, Officer Koenig put on his blue lights, at which point the driver of the pickup truck made "frantic movements." Koenig then pulled over the truck, asking the driver, Priddy, to get out. They saw a "large bulge" in his front pocket area. Priddy told the officer the bulge was a crack pipe. Priddy told the officers upon questioning him that he had crack as well on him. After arrest, a large piece of crack was seized from a cigarette box. Priddy was indicted for trafficking in methamphetamine, in addition to other offenses. His motion to suppress was denied, and he entered a conditional plea of guilty.

In an opinion written by Judge Johnson, the Court of Appeals reversed, joined by Judges Gudgel and Schroder. The Court analyzed the facts based upon *Alabama v. White*, 496 U.S. 325 (1990) and *Florida v. J.L.*, 529 U.S. 266 (2000), as well as *Stewart v. Commonwealth*, Ky. App., 44 S.W. 3d 376 (2000). In *J.L.*, the Court stated that, "[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated…an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity…as we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'"

The trial court distinguished *J.L.* by stating in this case, the officer "sees a vehicle matching that description and also sees him leaving the location after meeting up with another subject. So by his own observation he saw something that could indeed be the narcotics transaction." The Court noted that the underlined portion of the trial court's findings were "clearly erroneous." "[W]e must hold that the trial court erred by ruling that based upon an analysis of all the facts and the totality of the circumstances that there was a reasonable articulable suspicion that criminal activity was afoot. Without Priddy having met with another person in the parking lot where it would have been easy for a drug transaction to have occurred, the remaining facts in this case fail to sup-

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port a reasonable articulable suspicion that a drug transaction was about to occur or had just occurred."

United States v. Townsend & Green

305 F.3d 537 (6th Cir. 2002)

This is a case about a stop on the interstate. It is an important case that began with the stopping of a car driven by Townsend on I-70 driving 76 mph at 3:00 a.m. Townsend put his hands in the air without being told to do so, admitted driving over the speed limit, and produced his license, registration, and proof of insurance. The car was registered to Townsend's mother. Townsend stated that he and Green were driving from Chicago to visit Townsend's sister in Columbus, Ohio. Townsend stated that he was going to call his sister when he got to Columbus. The officer observed 3 cell phones and a Bible in the back seat. A large roll of cash was felt when the defendants were frisked. A passenger compartment search for weapons was negative. The defendants were then required to sit in the back seat of the patrol car for 30 minutes for a drug-sniffing dog to be called. The dog alerted on the trunk, but nothing was found there. A CD changer was dismantled where drugs were not found, but counterfeit money was. No narcotics were ever found in the car. The defendants were charged with possession of counterfeit money.

The U.S. district judge, however, suppressed the counterfeit money finding that while the officers had probable cause to stop Townsend based upon his speeding, the officers had not had reasonable suspicion to detain Townsend and Green for 30 minutes to await the drug-sniffing dog. The United States appealed.

The Sixth Circuit, in an opinion by Judge Boggs and joined by Judges Krupansky and Lawson, affirmed the suppression finding of the district court. The issue to be decided was whether "the officers had the reasonable suspicion necessary for the continued investigatory detention of the defendants, a detention that permitted the canine unit to arrive and that created the probable cause that would otherwise justify the search." The Court went about their business of answering using the following plumb line: "The 'reasonable suspicion' determination is ultimately a mixed question of law and fact (or, in other words, an application of law to fact), by which the court determines whether the facts surrounding the officer's determination are of sufficient legal significance to constitute reasonable suspicion. Accordingly, the application of the legal principles surrounding the nature of reasonable suspicion to the facts observed by an officer is reviewed *de novo* by this court, as mixed questions of law and fact typically are. *Ornelas v. United States*, 517 U.S. 690,697 (1996)."

The Court examined each of the facts asserted by the government to be demonstrative of a reasonable suspicion. The first factor asserted by the government was that the defendant held his arms up quickly and was "unusually cooperative," which was viewed as "a very weak indicator of criminal conduct." The "dubious travel plans…lacks the indicia of the untruthfulness that we have held particularly suspicious in the past." The Court dispensed with the third factor as follows: "traveling from Chicago to Columbus, two large, mutually proximate Midwestern cities, is a …common occurrence." 3 cell phones in the back seat was viewed as a weak indication of criminality. The presence of a Bible was viewed likewise. The large roll of cash was rejected because the government failed to prove with specificity how much money the defendants was carrying. Although it was significant that the defendant had previously been arrested on a weapons charge, once "the officers had satisfied themselves that there were no available weapons, the arrest (without even a conviction) would carry very little weight…" Appearing nervous, *i.e.* "repeatedly looking back at the patrol car," was rejected because the officers' testimony had been "inconsistent and not credible." The cluttered interior of the car was viewed as "not terribly suspicious." Finally, the fact that Townsend was driving his mother's car was "comparatively weak." In sum, the factors relied upon by the government "are all relatively minor and, in many cases, are subject to significant qualification. The fact of the matter is that this case lacks any of the stronger indicators of criminal conduct that have accompanied these minor factors in other cases. We hold that the officers lacked reasonable suspicion to detain the defendants until the canine unit arrived."

United States v. Bailey

302 F.3d 652 (6th Cir. 2002)

A similar case to *Townsend & Green* ended with a different result. In this case, two police officers in Morristown, Tennessee, were "investigating complaints of drug trafficking at the Royal Mobile Home Trailer Park." Specifically, they were "'making traffic stops where we'd get some probable cause to make the stop, if a traffic violation, of vehicles leaving the scene where they were, [sic] had the trailer under surveillance.'"

Bailey drove into the trailer park and he and the police car, which he described as "hogging the road," almost collided. Officer Davidson shouted at Bailey to stop, and then chased him on foot. As Davidson approached Bailey's car, Bailey reached into the floorboard, later testifying that he was reaching for his driver's registration. Davidson asked Bailey to step out of the car, and then detained him for 2 minutes to await a drug-sniffing dog. Officer Graham told Davidson to pull his hands out of his pockets, and then saw the butt of a gun. Bailey was arrested, with Officer Cox saying, "'everything would be okay.'" Bailey responded that everything would not be okay because "'there's three ounces of cocaine in the car.'" Two guns and 3 ounces of cocaine were found in the car. Bailey was charged with knowingly and intentionally carrying certain firearms during and in relation to a drug traf-

ficking offense, and possessing firearms as a convicted felon. The magistrate judge rejected Bailey's motion to suppress, but the U.S. District Judge granted it, finding that "'the officers' actions [in stopping and searching Bailey] were not justified at their inception, and their actions were not reasonably related in scope to the circumstances which justified the interference in the first place.'"

The Sixth Circuit reversed in an opinion written by Judge Moore and joined by Judges Gilman and Rosen. The Court declined to look at the pretextual nature of the stop, as had the district judge. The Court found that the officers had probable cause to stop Bailey for a driving offense. The Court then found that Bailey's reaching for his driver's license "in the context of the surrounding circumstances could have been legitimately perceived as threatening," thus justifying Davidson's detention of Bailey. Thereafter, the Court determined that the 2 minute detention was "'reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances.'"

United States v. Elkins
300 F.3d 638 (6th Cir. 2002)

This case from the Sixth Circuit involves a large marijuana operation in Memphis, Tennessee located in various commercial buildings as well as homes. The police received a tip regarding the operation and began to conduct an investigation, including surveillance, the use of thermal imaging devices, the request for consent, and the obtaining of search warrants.

Judge Gibson wrote the opinion for the Court. First, the Court avoided the constitutional question of whether the limitations announced in *Kyllo v. United States*, 533 U.S. 27 (2001) would apply to the use of thermal imaging devices with commercial buildings. "While *Kyllo* broadly protects homes against warrantless thermal imaging, the case before us involves the use of a thermal imager to scan the Elkinses' commercial buildings. There is a reasonable expectation of privacy in business premises, yet it is less than the reasonable expectation of privacy enjoyed by the home…There is little federal precedent on the thermal imaging of commercial property, and none since *Kyllo*…"

The Court affirmed the district court's holding that Elkins had consented to the search of one of his buildings, contrary to his assertion that his consent had been coerced. In a fact-bound analysis, the Court found that Elkins had consented and that he had not met his burden of showing "'some objectively improper action on the part of the police.'"

The Court also affirmed the district court's holding that the police had committed a *Franks* violation when they called an anonymous tipster a "confidential informant." "The distinction is relevant whenever tips are at issue in a warrant application. It should be readily familiar to police officers, so disregarding it suggests recklessness." The Court further held that the warrant still established probable cause despite information excluded based upon the *Franks* violation.

The Court reversed the district court's holding suppressing some evidence obtained after police officers looked into a hole around an exposed PVC pipe. The Court held that the police had lawfully observed marijuana plants while looking through the hole, and that exigent circumstances had arisen justifying a warrantless entry into the building to prevent evidence from being destroyed. The Court noted that because the area next to the PVC pipe was accessible to the public, it was virtually an open field and the officer could peer into it. The view itself was accomplished without the use of another device, and thus was done in "plain view."

The Court also reversed the district court's holding that the exigent circumstances exception to the warrant requirement did not apply in this case. The Court held that the Government had demonstrated "(1) a reasonable belief that other persons are inside the building; and (2) a reasonable belief that these persons are likely to destroy evidence of a crime." "The decisions emphasize the question whether, immediately prior to the warrantless search, police had objective grounds to believe that suspects were aware that police were close on their trail. When the answer to this question is yes, this court has regularly held that exigent circumstances existed to support a warrantless search of the location in question."

United States v. Elmore
177 F.Supp.2d 773 (6th Cir. 2001)

One Orlando Elmore was driving a 1991 Cadillac with Tyrone Maynus as his passenger, when they were stopped in Logan County, Ohio, for failing to have a visible rear license plate. After the stop, the officer saw through a heavily tinted rear window a temporary license tag. The officer began to question Orlando and Tyrone about their destination, the smell of burnt marijuana, and other matters. Orlando eventually consented to a search of the car. A drug dog alerted on the car and 6 kilograms of cocaine was found hidden in the car. N'Kenley Elmore was implicated by Orlando, and eventually all three, Orlando, Tyrone, and N'Kenley, were indicted. A district judge granted N'Kenley's motion to suppress the evidence, finding that as the "'putative owner' of the car, Elmore had a subjective expectation of privacy in it; that 'an owner's expectation of privacy in a car with tinted windows is of a type that society would recognize as legitimate,' and was therefore objectively reasonable; that based on this reasonable expectation of privacy, Elmore could challenge the constitutionality of the search of the car and seizure of the evidence; and that once Officer Robinson detected the temporary license tag in the rear window of the car, regardless of whether that tag could be read through the tinted window, he no longer had any justification for the stop, the subsequent search was unconstitutional, and all evidence resulting from the stop was tainted."

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The Sixth Circuit reversed, in a decision written by Judge Batchelder and joined by Judges Suhrheinrich and Little. The Court first held that because N'Kenley Elmore had shown no possessory interest in the car that he could not challenge the stop. Further, the Court held that "Elmore has shown neither an expectation of privacy that is personal to him…nor an expectation of privacy that society is prepared to consider reasonable." Thus, N'Kenley Elmore could not challenge the stop or seizure of the car.

United States v. Miggins & McDaniels
302 F.3d 384 (6th Cir. 2002)

This is a case involving numerous defendants and complicated facts that need not be repeated here. In an opinion by Judge Clay, joined in by Judges Siler and Nelson, the Court affirmed a number of denials of motions to suppress.

The most interesting of the holdings pertains to anticipatory search warrants. The Court notes that the Sixth Circuit has approved the use of anticipatory search warrants. The question involved in this case is whether the triggering event to allow for the police to execute the search warrant, in this case the delivery of a package to a particular address and possession of the package by a person at the address, was met by 3 of the people leaving the home to take the package and thereafter leaving. "[W]e believe that the triggering event for the anticipatory search warrant was met. Here, the triggering event required the delivery and acceptance of the package by someone inside the residence. On its face, the affidavit does not require that the person receiving the package actually be inside the residence when the package is delivered or that the person receiving the package take it inside the residence and remain indoors…Read in a commonsense fashion, and avoiding a 'hypertechnical' construction, we believe that the triggering event language of the affidavit was satisfied if the package was taken by someone who had been inside the residence just prior to its delivery…Because there was sufficient delivery of the parcel to Moore's residence to fulfill the condition of the anticipatory search warrant, the police were thus authorized to search Moore's residence."

United States v. Orsolini
218 F.Supp.2d 952 (Tenn., 2001)

Joshua Orsolini was stopped for speeding on I-40 in Tennessee, going over 80 in a 65 zone. The Officer questioned Orsolini about his license, registration, and while doing so made several observations. Based upon that, he "suspected that Orsolini and his passenger were engaged in drug trafficking." Another officer arrived and began to question Orsolini. After a citation was written, Orsolini was told he was free to go, but was also asked for consent to search the car. Orsolini became "visibly nervous." While he consented to the search, he soon revoked his consent. The officers told Orsolini he was free to go, but that the car was going to be held so that a narcotics dog could sniff it. A third officer drove Orsolini and his passenger to a store. Almost an hour after the initial stop, a dog arrived and "detected the presence of drugs in the car." Drugs were found in the trunk. Orsolini and the passengers were picked up and arrested for possession with intent to distribute marijuana. However, a motion to suppress was successful, and the government appealed. In an opinion by Judge Gilman, joined by Judges Siler and Suhrheinrich, the Sixth Circuit reversed.

The district court had found 6 circumstances to be the basis for the officers' suspicion that Orsolini was involved in a crime. The government contended, and the Sixth Circuit agreed, that the district court had erred by considering the circumstances in isolation rather than their totality. The circumstances were the "recent purchase of the vehicle with cash in a source city for drugs," inconsistent stories about their reason for having been in Texas, about who they were visiting in Detroit, about the nature of the relationship between Orsolini and his passenger, Orsolini's nervousness, and his taking back of his consent. The Court also held that the district court failed to consider that Orsolini was carrying only a photocopy of an interim driver's license, that he had luggage in the back seat of the car rather than in the trunk, and that it appeared to the officer that Orsolini and his passenger had been traveling without stopping. "None of these individual circumstances is sufficient by itself to create a reasonable suspicion of criminal activity, but when combined with the six factors that the district court did consider, we believe that they are sufficient to support a reasonable suspicion."

Interestingly, the Court stated that this "is admittedly a close case." One wonders under these circumstances why the Court did not give deference to the findings of the district court.

The Court also reversed the district court's holding that Orsolini had been detained for an unreasonable length of time. "The entire investigation thus lasted for less than one hour. Of that time, approximately 35 minutes were spent waiting for a canine unit to arrive…Moreover, at 3:27 p.m., the officers told Orsolini and his passenger that they were free to leave the scene of the traffic stop…Under all of these circumstances, there is no reason to believe that the officers did not diligently pursue their investigation or that the detention lasted any longer than was reasonably necessary to effectuate the purpose of the initial *Terry* stop."

United States v. Chapman
305 F.3d 530 (6th Cir. 2002)

In 1999, the Louisville Police Department traced a package containing 1 kilogram of cocaine they had intercepted to an abandoned home that Lonnell Shelmon used to receive packages. The police began to follow Shelmon, saw him leave his parole officer and go to a motel. When he saw the police, he took off running. He was stopped and a bag of cocaine was

found in his pocket. Shelmon told the officers he got the cocaine from people in Room 219 of the More Motel. The officers saw several men walking from the hotel, who went separate directions when they saw Shelmon being questioned. An officer approached Chapman, who was carrying a trash bag. When Chapman dropped the trash bag, it broke open and "cocaine residue, a baking soda box, several small plastic bags, and a mixer" were revealed. Chapman was arrested and later indicted for conspiracy to distribute cocaine base and possession of cocaine base with intent to distribute. His motion to suppress was denied, after which Chapman entered a conditional plea of guilty.

In an opinion written by Judge Boggs and joined by Judges Nelson and Norris, the Sixth Circuit affirmed. The Court found that Chapman had not been seized under the circumstances of the case. "Napier had only identified himself as a police officer and requested to ask Chapman a few questions by the time Chapman had dropped the bag, revealing the evidence sufficient to establish probable cause for the arrest." Further, the Court held that even if Chapman had been seized, that there was sufficient reasonable suspicion to justify it. "Given the officers' information that a significant drug operation had been running in the very immediate past inside the hotel, the report that a black man involved in a fight was fleeing the hotel, and Chapman's suspicious behavior outside of the hotel, Napier and Dotson had observed articulable facts providing reasonable suspicion for a *Terry* stop."

United States v. Stewart
306 F.3d 295 (6th Cir. 2002)

This is a case involving a large drug conspiracy in Chattanooga, Tennessee. The government obtained authorization for electronic surveillance of telephones, which led to the arrest of a number of people. The authorization was supported by a 100-page affidavit. After being charged, the defendants' attacked the evidence obtained as a result of the surveillance by stating that the government had failed to demonstrate the necessity for the wiretap. The defendants' motion to suppress was denied without a hearing. The Sixth Circuit affirmed in a decision written by Judge Clay and joined by Judges Gilman and Wallace.

The Court first held that the government had complied with the wiretap statute, which requires an application containing a "'full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'" The Court found the government to have complied saying that the "government need not prove the impossibility of other means of obtaining information. Instead, the necessity provisions merely require that law enforcement officials 'give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate."

The Court also rejected the defendants *Franks* argument. The Court stated that the defendants had failed to supply the court with any affidavits showing a false statement had been made in the application for the surveillance. Citing *United States v. Bennett*, 905 F. 2d 931 (6th Cir. 1990), the Court stated that a "'defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof. Moreover, he also should provide supporting affidavits or explain their absence. If he meets these requirements, then the question becomes whether, absent the challenged statements, there remains sufficient content in the affidavit to support a finding of probable cause.'"

United States v. Carnes
309 F.3d 950 (6th Cir. 2002)

Carnes was arrested at the home of his girlfriend, Lisa Kellum, pursuant to an arrest warrant. Following the arrest, a warrantless search of the home was conducted, during which 6 cassette tapes, a handgun, and ammunition were discovered. A 7th tape was found later. A motion to suppress was filed and overruled. Carnes was convicted at a jury trial of possession of a firearm and ammunition by a felon, witness tampering, and illegally intercepting wire communications.

In an opinion written by Judge Keith joined by Judge Martin (on the search and seizure issue alone; Judge Kennedy wrote the opinion of the Court affirming the other convictions), the Court reversed the decision of the district judge overruling the motion to suppress, and reversing the conviction for the illegal interception of a wire communication.

The Court found the government's argument that Carnes had no reasonable expectation of privacy as to the tapes because they represented illegal wiretapping to be not "convincing." "The analogy between a car thief's right to privacy in a stolen vehicle and Carnes's right with respect to the tapes at issue is strained. The tapes themselves were not stolen, nor was the briefcase in which they were found. Moreover, illegally obtained objects, such as contraband, are often suppressed."

The Court also rejected two of the government's arguments that because Carnes was a parolee, the special needs of law enforcement outweighed Carnes privacy interest, citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987). The Court noted that the tapes "were not listened to until well after the parole hearing" which showed that "they were not originally seized, nor subsequently listened to, pursuant to the special authority granted the government for supervising parolees." The government's "failure to listen to the tapes until well after the parole hearing suggests some other motivation."

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Finally, the Court rejected the government's argument that based upon the totality of the circumstances Carnes had a reduced expectation of privacy, citing *United States v. Knights*, 112 S.Ct. 587 (2001). The Court noted that *Knights* had rejected the proposition that probationers and parolees can be searched without either a warrant or probable cause per se. The Court noted that Carnes had not bargained away his privacy rights as part of his conditions of parole to the extent that Knights had done. In Carnes' agreement, there was no clause indicating that he was giving up his privacy rights. As a result, "Carnes could not reasonably expect significant governmental intrusion into his life outside of the parole context from a regulation pertaining solely to investigations of parole violations." Therefore, the Court held that a warrant and probable cause to seize and listen to the tapes were required. Because they were not present, they were illegally seized and the conviction had to be reversed.

Judge Kennedy dissented on the search and seizure issue. While he agreed with Judge Keith on several of the majority's holdings, he "would hold that reasonable suspicion of the commission of a crime or parole violation satisfies the Fourth Amendment when a parolee is subject to a search condition, and furthermore that reasonable suspicion was present in this case."

United States v. Bass
2002 WL 31409301
(6th Cir. 2002)

Ernestine James called the Jackson, Tennessee Police Department after she saw a black male fire several gunshots at her son and two other men. The police arrived and went to the apartment where the gunman had fled. Niketa Jordan answered the door, and told the police that her husband and children were in the apartment. The police arrested Shawn Bass, her husband, and then conducted a "protective sweep" of the apartment, finding a sawed-off shotgun. Bass was indicted for being a felon in possession of a firearm and possession of an unregistered, sawed-off shotgun. He entered a conditional plea of guilty following his unsuccessful suppression motion.

In an opinion by Judge Gilman, joined by Judges Siler and Daughtrey, the Court affirmed the denial of the motion to suppress. The Court first held that the entry into the apartment without a warrant was constitutional because the police were in hot pursuit of a fleeing felon, and because there was a risk of danger to the police and others under the circumstances. Further, the Court held that the finding of the sawed-off shotgun was constitutional under the "protective sweep" doctrine of *Maryland v. Buie*, 494 U.S. 325 (1990).

United States v. Keszthelyi
308 F.3d 557 (6th Cir. 2002)

Keszthelyi remained illegally in this country, living in Chattanooga and operating a business. He became the object of an extensive investigation into trafficking in cocaine involving several confidential informants and undercover officers. Eventually, the police obtained a search warrant to search his home. He was arrested on October 8, 1999, at which time 4 grams of cocaine was found inside his garage door opener. A search of his house pursuant to a warrant revealed a semi-automatic pistol, a shotgun, $1000 in cash, and other items. A second search without a warrant revealed 1 ounce of cocaine. Keszthelyi eventually entered a conditional plea of guilty to one count of knowingly engaging in a monetary transaction in criminally derived property and one count of distributing cocaine. The Court of Appeals affirmed the denial of his motion to suppress in an opinion written by Judge Moore joined by Judges Siler and Boggs.

The basis of the appeal was Keszthelyi's allegation that Agent Harwood, the FBI undercover officer, had engaged in improprieties during the investigation involving an ex-girlfriend of the defendant's, and that Agent Isom had failed to include relevant information in the affidavit regarding the improprieties committed by Agent Harwood. The Court held that even if Agent Isom had intentionally or recklessly omitted facts regarding Agent Harwood, that under *Franks v. Delaware*, 438 U.S. 154 (1978), there was still probable cause shown by the unaffected portions of the affidavit.

The defendant also challenged the second search of his house that had been conducted without a warrant. The Court rejected the government's argument that the second search was a reasonable continuation of the first search. While a "single search warrant may authorize more than one entry into the premises identified in the warrant," it does not "permit the police unlimited access to the premises identified in a warrant throughout the life of the warrant. Courts have long recognized the dangers of official abuse that inhere in such a rule." In this case, the original search was thorough, and had been completed. "Thus, we think that when the agents terminated their search of the defendant's residence on October 8, 1999, the search was complete and the warrant was fully executed. If the agents desired to conduct an additional search after that time, we think they were required to apply for a new warrant or identify a valid exception to the warrant requirement authorizing reentry." Accordingly, the second search of the defendant's house without a second warrant was found to be unreasonable.

However, the Court found the cocaine admissible under the inevitable discovery rule. After the second search, a second search warrant was obtained. Relying upon *Nix v. Williams*, 467 U.S. 431 (1984), the Court held that the cocaine seized during the October 9 search would have been found during the execution of the warrant on October 11.

Farm Labor Organizing Committee, et. al. v. Ohio State Highway Patrol, et. al.
308 F.3d 523 (6th Cir. 2002)

This is a case about equal protection and racial profiling. It began with the stopping of Jose Aguilar and Irma Esparza, who were driving from Chicago, Illinois, to Toledo, Ohio, to visit family members. They were stopped by Ohio State Police Office Kevin Kiefer for driving with a faulty headlight. After receiving Aguilar's driving license, the officer ordered Aguilar out of the car and placed him in his cruiser. A second officer arrived with a drug dog who "alerted" on the car. Esparza was asked for identification; the trooper declined her identification card and grabbed her wallet and seized her green card instead. Esparza was put into the cruiser as well. Aguilar's green card was also seized. Eventually, this encounter became part of a class action lawsuit filed pursuant to #1983 by the Farm Labor Organizing Committee. It was before the Sixth Circuit on Trooper Kiefer's appeal of the district court's denial of his motion to dismiss based upon qualified immunity. For purposes of the appeal, the Court assumed the plaintiff's facts were true, and considered the question of whether under those facts their Fourth and Fourteenth Amendment rights had been violated.

The Sixth Circuit opinion is written by Judge Moore joined by Judge Cole. Judge Kennedy dissented. The Court noted that the Supreme Court in "*Whren v. United States*, confirmed that an officer's discriminatory motivations for pursuing a course of action can give rise to an Equal Protection claim, even where there are sufficient objective indicia of suspicion to justify the officer's actions under the Fourth Amendment." To make out an equal protection violation, a person must demonstrate that the law enforcement action was motivated by a discriminatory purpose and had a discriminatory effect. "'To establish discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.' *United States v. Armstrong*, 517 U.S. 456, 465 (1996)." The district court had found both, and due to the nature of the interlocutory appeal, the Sixth Court did not have the opportunity to review the factual sufficiency of the finding. The Court did hold that race did not have to be the sole motivating factor, but that it was sufficient to make a claim if race was a part of the motive for the law enforcement action. The Court also rejected the defendant's claim that the right was not clearly established at the time of the encounter, an issue relevant to the qualified immunity question. The Court noted that at least by 1992 it was "clearly established that the Constitution prohibited racial targeting in law enforcement investigations, regardless of whether an encounter was lawful under the Fourth Amendment." The Court concluded on the equal protection claim that the plaintiffs would "if proved, establish that Kiefer violated their rights under the Equal Protection Clause by targeting them for immigration-related questioning on the basis of their race. Moreover, we think that the relevant legal principles controlling this case were clearly established at the time of the defendant's actions."

The Court also addressed the question of whether the district court had properly denied Kiefer's summary judgment motion based upon his qualified immunity defense to the plaintiff's allegation that the seizure of the green cards had violated the Fourth Amendment. The Court found that while the seizure of the green cards was based upon reasonable suspicion, that the seizing and holding of the cards for 4 days "exceeded the legitimate scope of a seizure of property based upon less than probable cause." "Failure to carry one's green card on his or her person can subject a legal resident alien to criminal sanctions…and green cards are an essential means by which resident aliens can establish eligibility for employment and participation in federally funded programs…Given the importance of these documents, the challenged seizure undoubtedly subjected the plaintiffs to disruption of their travel plans in order to remain with the documents or arrange for their return." Accordingly, the Court held that the district court had properly denied the defendant's motion for summary judgment based upon a qualified immunity defense to the Fourth Amendment claim.

The Court went further. Because there was no dispute in regards to the Fourth Amendment claim, the Court proceeded to grant summary judgment to the plaintiffs. "[W]e conclude that the undisputed facts reveal that Trooper Kiefer violated the plaintiffs' clearly established rights by detaining their green cards for over four days without probable cause."

Judge Kennedy dissented. Judge Kennedy would have overruled the district court on both claims, finding qualified immunity for both. On the Equal Protection claim, Judge Kennedy believed that the defendant had demonstrated a race neutral reason for asking about the plaintiffs' immigration status: "namely, their difficulties in speaking and understanding English." Judge Kennedy also believed that because there was an issue of fact in dispute (whether the plaintiffs had told Trooper Kiefer they had paid for their green cards), the Court did not have jurisdiction to decide the appeal.

This is a significant case of which all defenders should be aware. We in Kentucky have a Racial Profiling Act. This case demonstrates that these kinds of cases, and I would contend motions to suppress, can be won on Equal Protection as well as Fourth Amendment grounds. Add to that the statutory violation of the Racial Profiling Act and defenders in Kentucky have fertile ground in which to plow.

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SHORT VIEW . . .

1. *State v. Comer*, 51 P.3d 55 (Utah App., 2002). Standing alone, a report of domestic violence occurring does not suffice to allow entry into a home. "We decline to adopt a rule whereby a reliable domestic disturbance report, by itself, would be viewed as supporting an objectively reasonable belief that a person has been seriously injured. Rather, we conclude there must be some reliable and specific indication of the probability that a person is suffering from a serious physical injury before application of the medical emergency doctrine is justified." However, in this particular case, the fact that the tip came from an "ordinary citizen-informant, combined with the actions of the wife when she answered the door, provided exigent circumstances sufficient to dispense with the warrant requirement. Once inside the house, the police found drugs and arrested both husband and wife.

2. *Jashienski v. Commonwealth*, 2001-CA-002188-MR, Ky. Ct. App., 9/23/02 (Not to be published). This is the first case touching on the Kentucky Racial Profiling Act. The defendant alleged that when he was stopped by the police in the vicinity of a liquor store in Hopkinsville while he was talking with a number of black men, he was being racially profiled. Jashienski is white. The majority of the Court of Appeals opinion is devoted to whether the search and seizure was reasonable or not. Ultimately, the Court found that the officer had reasonable, articulable suspicion that Jashienski was engaged in criminal activity. "The officer testified that there was a group of men—including Jashienski—who appeared to be loitering near a liquor store in an area of town commonly known for loitering. It was an area where the officer had made several drug related arrests. In addition, the officer noticed that Jashienski was considerably younger than the remaining members of the group; that he was in a neighborhood rarely frequented by other members of his race; that Jashienski turned his back when he realized he was being watched by a police officer; that he left the scene immediately after realizing that police were in the area; and that when approached by the officer, Jashienski refused to remove his hand from his pocket and otherwise attempted to evade the officer. We agree that when taken all together, these facts and circumstances relied on by Officer Schneider were sufficient to give rise to a reasonable suspicion that Jashienski might have been engaging in criminal activity." The Court also considered the Racial Profiling Act, KRS 15A.195, even though the case arose prior to the effective date of the RPA. The RPA was raised on appeal only in passing to demonstrate that the actions of the officer were based upon skin color and that factor could not be used to establish probable cause or reasonable suspicion. The Court held that the RPA did not apply. "While it is obvious from the testimony at the hearing that the officer's suspicions were at least partly aroused because of Jashienski's race, the appellant fails to indicate how his Fourth Amendment rights were implicated." The Court cites *Whren v. United States*, 517 U.S. 806 (1996) and *Wilson v. Commonwealth*, Ky., 37 S.W. 3d 745 (2001). Both *Whren* and *Wilson* hold that the subjective intention of the officer is irrelevant to the issue of probable cause. However, neither interprets a state statute such as KRS 15A.195. This statute makes racial profiling illegal, and implicates the exclusionary rule. The Court does not interpret the RPA, and the opinion is not to be published.

3. *United States v. Haqq*, 213 F.Supp.2d 383 (S.D.N.Y.,2002). A defendant has a reasonable expectation of privacy in luggage he has borrowed, even where he has no possessory interest in it. That conclusion led the U.S. District Court here to suppress evidence linked to the defendant found in the borrowed suitcase during the execution of an arrest warrant. The Court viewed the defendant's expectation of privacy as reasonable "because our society recognizes such an expectation in a suitcase that one takes with him for a two-week trip, packs his belongings therein, and treats as his own, even if it is borrowed from a roommate."

4. *State v. Frank*, 650 N.W.2d 213 (Minn.App., 2002). A passenger's suitcase may not be searched based upon the consent of the driver rather than probable cause to believe that there is contraband in the car. The Court rejected the government's reliance upon *Wyoming v. Houghton*, 526 U.S. 295 (1999), drawing a distinction between a probable cause automobile search, and a search conducted only upon the driver's consent. Where the police have reason to believe that individual items in the car belong to someone other than the driver, they may not search those items without the owner's consent, or probable cause. ■

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KENTUCKY CASELAW REVIEW

Commonwealth of Kentucky v. Billy Stewart Jeffries,
Ky., __S.W.3d __ (11/21/02)
(Remanding for new
KRS 640.030(2) sentencing proceeding)

Billy Stewart Jeffries was convicted of the murder and attempted rape of an elderly female. Jeffries was a 17-year-old juvenile at the time he was convicted of the crimes. In December of 1997, Jeffries turned 18 years of age and was sent to the Shelby Circuit Court for a sentencing hearing conducted pursuant to KRS 640.030(2). Under this statute, the trial court must determine whether a youthful offender should be given probation or conditional discharge, returned to the Department of Juvenile Justice for treatment not to exceed six months, or remanded to the Department of Corrections to serve the remainder of his or her sentence in an adult prison.

Prior to his sentencing hearing under KRS 640.030, the trial court ordered that Dr. Katherine Peterson conduct a psychological evaluation of Jeffries. Jeffries subpoenaed Dr. Peterson in order to question her with regard to her expertise concerning sexual offender treatment programs for "non-admitters" (*i.e.*, convicted offenders who do not admit they committed a sex crime). During Jeffries confinement at the Central Kentucky Youth Development Center (CKYDC), his trial counsel had requested that Jeffries be placed in a treatment program for non-admitters. Jeffries argued that he should be allowed to call Dr. Peterson as a witness in order to question her about his amenability to sexual offender treatment if a non-admitter program had been available to him. Jeffries also subpoenaed a witness from CKYDC who would provide testimony regarding his progress in treatment.

The trial court would not permit Jeffries to cross-examine Dr. Peterson or call any other witnesses on his behalf at the hearing. In addition, the trial court would not allow the avowal testimony of Dr. Peterson or any other witness. The trial court then determined that probation was not appropriate for Jeffries and ordered that he serve out the remainder of his sentence in an adult prison. Jeffries appealed to the Kentucky Court of Appeals, which reversed, finding that the trial court's refusal to admit evidence of rehabilitation violated Jeffries' due process rights. The Commonwealth moved for discretionary review in the Kentucky Supreme Court, which was granted.

Youthful Offenders Sentenced Pursuant To KRS 640.030(2) Must Receive Same Procedural Due Process Afforded Adult Offenders Under KRS 532.050. After reviewing its decisions in *Johnson v. Commonwealth*, Ky., 967 S.W.2d 12 (1998) and *Edmonson v. Commonwealth*, Ky., 725 S.W.2d 595 (1987) as well as RCr 11.02, the Supreme Court held that a trial court conducting a youthful offender sentencing hearing pursuant to KRS 640.030(6) must exercise its discretion to impose one of the three sentencing alternatives available "only after the youthful offender has been afforded a meaningful opportunity to controvert the evidence against him and to present evidence in mitigation of punishment." In Jeffries' case, the Supreme Court found the trial court erred by not providing Jeffries "a worthwhile hearing." Despite its holding, the Court declined to prescribe the exact procedures the Shelby Circuit Court (or any trial court) should follow. Instead, the Court called upon the trial court to use its "learned discretion" when determining "what process is due a youthful offender at a sentencing hearing held pursuant to KRS 640.030(2)."

Justice Keller concurred in part and dissented in part. Justice Keller agreed that the case should be remanded for a new sentencing hearing. However, in Justice Keller's view, the majority's opinion was unnecessarily narrow and sidestepped the only real issue in the case – whether the trial court denied Jeffries procedural due process when it would not allow him to examine Dr. Peterson and the other witnesses under oath. Justice Keller would adopt the part of the Kentucky Court of Appeals opinion that specifically held that the trial court's evidentiary rulings with respect to Dr. Peterson and the other witnesses denied Jeffries procedural due process.

Justice Johnstone, joined by Justices Graves and Wintersheimer, dissented. In Johnstone's view, the trial court properly exercised its discretion and Jeffries received all the process he was due.

***Ronnie Earl Norris, Sr. v. Commonwealth of Kentucky*,**
Ky., __S.W.2d __ (11/21/02)
(Reversing and remanding)

In January of 2000, Detective Brett Goode of the Lexington Police Department received a report alleging that Ronnie Norris, Sr. had engaged in sexual intercourse with his minor daughter, A.N., who was living in foster care at the time of the accusation. She was removed from the family home by the Cabinet for Families and Children because she had conceived a child fathered by her brother, Ronnie Jr. By the time Norris was tried, his wife, Fern Norris, had been acquitted of incest with their son Ronnie, Jr. At trial, Norris did not testify. His defense was that he was physically incapable of committing incest with A.N. because he had recently undergone major leg surgery and that A.N. had fabricated the allegations to avoid being forced to leave her foster home, where she was well adjusted and happy. Ultimately, the jury convicted Norris on two counts of incest. He was sentenced to 10 years on each count, to be served consecutively.

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Norris should have been permitted to introduce evidence of Fern Norris' acquittal on the incest charge under the doctrine of curative admissibility, commonly known as "opening the door." At trial, Detective Goode testified for the prosecution. During cross-examination, defense counsel questioned Goode about his case investigation technique. Goode responded that he started by examining the allegation, which he then offered to read for the jury. Defense counsel permitted Goode to read the allegation, which, in addition to information about Norris, concluded with "[a]nd also, Ronnie, Jr., … had had a sexual relationship with his mother, Fern Norris…." On redirect, the prosecution sought to inquire about Fern Norris' alleged incest since the defense had "already touched upon that line of inquiry." Defense counsel did not object. The prosecution then asked Goode several questions about Fern Norris, which created the impression that she was guilty of incest with her son. On re-cross, the defense attempted to rehabilitate Norris' reputation by eliciting a statement from Goode that Fern Norris was ultimately acquitted on the incest charge, but the prosecution objected. The trial court sustained that objection, suppressing the acquittal evidence.

On appeal, Norris argued that the trial court erred when it refused to allow him to elicit testimony that Fern Norris was acquitted of the incest charge. The Supreme Court agreed and reversed for a new trial. The Court noted that the case presented the doctrine of curative admissibility, commonly known as "opening the door." R. Lawson, *The Kentucky Evidence Law Handbook*, § 1.10, 30-33 (3d ed. Michie 1993). Despite the prosecutor's claim to the contrary, evidence of Fern Norris' alleged incest was inadmissible character evidence. "It did nothing more than insinuate that Norris was probably guilty of incest with his daughter because everybody else in the family routinely committed incest with each other." The fact that Norris did not object to the evidence at trial did make it admissible. Quoting the Kansas Supreme Court's decision in *Dewey v. Funk*, 505 P.2d 722 (Kan. 1973), the Court noted that "'…the opponent may reply with similar [inadmissible] evidence whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence….' 505 P.2d at 724 (emphasis in original)."

Taped interview with Ronnie, Jr., accusing Norris of incest with another daughter may be inadmissible under KRE 404(b). At trial, Ronnie Jr.'s testimony contradicted a previous taped statement he gave to Detective Goode, implicating his father. The prosecutor introduced the taped statement as impeachment evidence. However, the tape contained statements about Fern Norris' alleged incest and Norris' alleged incest with both A.N. and another daughter, K.N. Norris was not charged with incest against K.N. On appeal, Norris argued that Ronnie Jr.'s taped statements referring to Norris' alleged incest with K.N. violated KRE 404(b). The Court noted that some parts of the tapes might be inadmissible, but declined to make a definitive ruling on this evidence "because of the changing circumstances that could occur at retrial." The Court reminded the trial court to follow the balancing test outlined in *Bell v. Commonwealth*, Ky., 875 S.W.2d 882 (1994) and cautioned that the trial court should include in the record the reasons for its ruling on admissibility.

Finally, despite Norris' claim that he was entitled to a directed verdict on the charges, the Court found there was sufficient evidence to allow the case to go to the jury.

Justice Keller, joined by Justice Wintersheimer, dissented. In Justice Keller's view, Norris did not properly preserve his claim that he should have been able to elicit testimony from Detective Goode regarding Fern Norris' acquittal because he did not put the testimony on record by avowal.

Wayne J. Parks v. Commonwealth of Kentucky,
Ky., __S.W.3d __ (11/21/02)
(Affirming)

Waiver of speedy trial rights under Interstate Agreement on Detainers occurred when defense counsel acquiesced to trial date outside the 120-day time limitation. On April 10, 1999, Parks stabbed a convenience store clerk to death while committing a robbery. At the time of his indictment on September 7, 1999, Parks was incarcerated in Indiana on unrelated charges. On August 17, 2001, he was transferred to Kentucky to face the charges. Ultimately, Parks entered a conditional guilty plea to murder, first-degree robbery and first-degree persistent felony offender. He was sentenced to a total of 20 years in prison.

On appeal, Parks' sole argument was that the trial judge erred when he refused to dismiss the indictment against him following the Commonwealth's failure to bring him to trial within 120 days of his return to Kentucky from Indiana. While the Supreme Court agreed that the 120-day time limitation of the Interstate Agreement on Detainers had been violated, the Court held that Parks waived his right to complain of the violation by acquiescing to be tried outside the required time period. An affirmative waiver by defense counsel is not necessary. *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000).

Dwayne Earl Bishop v. John David Caudill, Judge, Floyd Circuit Court and Commonwealth of Kentucky,
Ky., 87 S.W.3d 1 (2002)
(Reversing and remanding)

On October 26, 2000, Bishop was charged for the murder of his wife, Carolyn Bishop, in indictment number 00-CR-00061. Following arraignment, the trial was set for June 18, 2001. Sometime later, the prosecutor interviewed Bishop's girlfriend, Pamela Kidd. Kidd told him that she knew Bishop did not commit the murder, that she had spoken with him numerous times by telephone the day of the murder, that he could not have done it, and that she had information regarding a house

located near the area where the victim's body had been found that was the real location of the murder. When the prosecutor suggested she furnish this information to the grand jury, Kidd refused, adding that she would not testify at trial either. Kidd also stated that her daughter, Samantha, who had been interviewed previously by the police, would not be available to testify. On April 16, 2002, subpoenas were issued under Bishop's indictment number 00-CR-00061 commanding Kidd and her daughter to appear before the grand jury for the purpose of testifying for the Commonwealth. Bishop moved to quash the subpoenas on the ground that the dominant purpose of the subpoenas was to allow the prosecution to improperly discover evidence relevant to Bishop's defense in order to facilitate the prosecution's preparation for trial. The trial court denied Bishop's motion and his request to question the prosecutor under oath regarding the purpose of the subpoenas.

Bishop then petitioned the Court of Appeals for a writ prohibiting the trial judge from allowing the Commonwealth to use the grand jury process for discovery purposes. The Court of Appeals denied the petition, holding that (1) Bishop did not have standing to challenge the subpoenas, and (2) Bishop had an adequate remedy through motions to exclude or suppress the results of the improper use of the grand jury.

Grand jury's function with respect to a particular investigation concludes with the issuance of an indictment. Upon review, the Supreme Court held that a grand jury's function with respect to a particular investigation concludes with the issuing of the indictment. Where there is additional inculpatory evidence, the grand jury can issue a new indictment charging the defendant with additional offenses or naming additional defendants. However, there is no authority for permitting a grand jury to recall, or quash, a rendered indictment on the basis of newly discovered exculpatory evidence or to amend an indictment to add new charges or additional penalties.

Defendant has standing to quash grand jury subpoena if the sole purpose of the subpoena is to discover facts relating to a pending indictment. In addition, the Court held that although the general rule is that a defendant does not have standing to move to quash subpoenas for other witnesses, a defendant does have standing if the prosecution's sole or dominant purpose in issuing a subpoena is to discover facts relating to a pending indictment. *United States v. Breitkreutz*, 977 F.2d 214 (6th Cir. 1992).

The Court reversed and remanded the case to the Court of Appeals with instructions that a writ of prohibition be issued until an evidentiary hearing has been held and a determination has been made regarding the purpose of the subpoenas.

Justice Keller concurred in part and dissented in part. In his view, remand to the Court of Appeals for a writ of prohibition was proper. However, he dissented to the extent that an evidentiary hearing was ordered to determine the purpose of the subpoenas. In his opinion, the Court should require a higher threshold of wrongdoing before it subjects prosecutors to cross-examination under oath as to the details of grand jury investigations. Justice Keller proposed an alternative solution where the prosecutor could submit affidavits to the trial court.

Justice Wintersheimer dissented "because Bishop had an adequate remedy through motions to exclude or suppress."

Edwardo Rodriguez v. Commonwealth of Kentucky,
Ky., 87 S.W.3d 8 (2002)
(Reversing and remanding)

Written waiver of attorney/client privilege not necessary where defendant moves to set aside guilty plea on basis of attorney coercion and ineffective assistance of counsel. Rodriguez was indicted for murder and receiving a stolen firearm. He entered a guilty plea on the murder charge in exchange for the prosecutor's agreement to dismiss the firearm charge and a recommendation for a 20-year sentence. Following the entry of the plea, but prior to final sentencing, Rodriguez fired his public defender, retained private counsel, and filed a RCr 8.08 motion to set aside his guilty plea and reinstate his previous plea of not guilty. Rodriguez asserted that his plea was involuntary because it was coerced by counsel and was a product of ineffective assistance of counsel. The trial court refused to hold an evidentiary hearing unless Rodriguez executed a blanket written waiver of his lawyer/client privilege. Rodriguez refused to sign the waiver. The trial court proceeded with final sentencing and imposed the 20-year sentence.

On appeal, the Supreme Court held that a written waiver is unnecessary because "waiver of the lawyer/client privilege is implied and automatic 'where a client testifies against the attorney, as where a defendant testifies adversely to his attorney's competence or alleges attorney misconduct … 81 Am.Jur.2d, *Witnesses* § 353 (1992).'" The Court noted that the waiver applies only to the matters put in issue by the defendant's motion. On remand, the Court ordered the trial court to make a determination, after an evidentiary hearing, whether under the "totality of the circumstances" Rodriguez' guilty plea was voluntary. If the trial court finds that the plea was involuntary, Rodriguez should be permitted to withdraw his plea and reinstate his previous plea of not guilty.

In addition, the Supreme Court recognized that claims of ineffective assistance of counsel are not limited to RCr 11.42 motions. "To the contrary, nothing precludes raising the issue either in a motion for a new trial or, as here, in a motion to set aside a plea of guilty so long as there is sufficient evidence in the trial record or adduced at a post-trial evidentiary hearing to make a proper determination." *Humphrey v. Commonwealth*, Ky., 962 S.W.2d 870, 872-73 (1998).

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Justice Wintersheimer dissented "because there was no abuse of discretion in refusing an evidentiary hearing."

***Commonwealth of Kentucky v. Adrien Lamont Townsend*, Ky., 87 S.W.3d 12 (2002)**
(Reversing)

Youthful offender can waive mandatory release following recommitment to treatment program under KRS 640.030(2)(b). Townsend, a 16-year-old youthful offender, entered a guilty plea to first-degree robbery and was sentenced to 10 years in prison. Thereafter, his sentence was governed by KRS 640.030(2). Under KRS 640.030(2), when a youthful offender reaches the age of 18 prior to the expiration of his or her sentence, the offender must return to the sentencing court. At that time, the sentencing court has three options: (1) probation or conditional discharge, (2) return the offender to the youth facility to complete a treatment program for a period not to exceed six months, or (3) incarceration in an adult facility to serve out the remainder of the sentence. If the sentencing court opts for the second alternative and orders the return to a youth facility for completion of a treatment program, the offender must be released upon finishing the program, or six months, whichever occurs first.

In Townsend's case, the sentencing court was hesitant to recommit Townsend to a youth facility to compete his treatment program. In exchange, Townsend agreed to waive any challenge to the sentencing court's jurisdiction and submit himself for re-sentencing at the end the six-month period. At the end of the six-month period, the sentencing court entered final judgment ordering that Townsend serve out the remainder of his10-year sentence in an adult facility. Townsend appealed, arguing that the sentencing court did not have jurisdiction to re-sentence him under KRS 640.030(2)(b). The Court of Appeals agreed and vacated the final judgment.

Upon review, the Supreme Court held that the plain language of KRS 640.030(2)(b) precludes a trial court from conducting yet another sentencing hearing at the conclusion of the six-month treatment program. However, the Court found that since KRS 640.030(2)(b) benefits the offender, it could be the subject of a waiver, like any other constitutional or statutory right. Accordingly, the Court ruled that Townsend was not entitled to relief from the remainder of his sentence because he voluntarily waived mandatory release in open court. ■

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6th Circuit Review

Emily Holt

Hardaway v. Withrow
305 F.3d 558 (6th Cir. 9/30/02)

In this case, the Court of Appeals reverses the district court's grant of a writ of habeas corpus to Hardaway. Hardaway was convicted in Michigan state court of second-degree murder after killing a man, Lenzy, during a drug transaction. He was indicted on first-degree murder. At trial, Hardaway testified he shot Lenzy in self-defense and was only guilty of voluntary manslaughter. The prosecution's theory of the case was that Hardaway intended to kill Lenzy and 2 other drug buyers in a robbery attempt.

Court Reporter's Transcript is Not Presumed to be Correct. At trial, the court instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. The first issue on habeas review centers on the reading of the trial transcript. The jury, during deliberations, requested that the judge re-read the instruction for second-degree murder. After the jury had left the courtroom to return to deliberations, there was a debate whether one juror wanted to hear the manslaughter instruction repeated as well. The judge decided to wait until he heard from the jury. The next day, the trial transcript reflects the following: "All right. Let me just say, gentleman, that I did get a note wherein the jury asked for a Xerox copy of 2nd Degree Involuntary Manslaughter and I sent those in to them and we've just a couple of minutes ago got a note from them indicating they have a verdict so let's bring the jurors in."

The district court granted relief on the claim that the trial court erred when it erroneously gave an involuntary manslaughter instruction instead of a voluntary manslaughter instruction. The Court of Appeals reversed because under the AEDPA "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. Section 2254(e)(1). In the case at bar, the Michigan Court of Appeals found that the court recorder either mistranscribed what she heard (*i.e.* the trial court stated it was sending back 2nd degree murder and voluntary manslaughter) or the trial court misspoke. The document sent back was not an invol-

untary manslaughter instruction but a voluntary manslaughter instruction. In so holding, the Court rejects the presumption that a court reporter's transcript is presumed to be correct. *Abatino v. U.S.*, 750 F.2d 1442, 1445 (9th Cir. 1985).

Harmless Error for Trial Court to Exclude Element of Crime in Jury Instruction. The Court also affirms the district court's rejection of another jury instruction claim. The trial court failed to instruct the jury that under Michigan law the crime of second-degree murder requires that the prosecutor prove that death was not justified or excused. Because the trial court did instruct on self-defense and made clear to the jury that it was not up to Hardaway to prove he acted in self-defense, it was harmless error for the jury not to formally include the element that the prosecution prove death was not justified. "To warrant habeas relief the jury instructions must not only have been erroneous, but also, taken as a whole, so infirm that they rendered the entire trial fundamentally unfair." *Scott v. Mitchell*, 209 F.3d 854, 882 (6th Cir. 2000). Also, an incomplete instruction is less likely to be prejudicial than a misstatement of the law.

Lewis v. Wilkinson et al.
307 F.3d 413 (6th Cir. 10/7/02)

Reversible Error where Trial Court Excluded Rape Victim's Diary. In this case, the 6th Circuit grants a writ of habeas corpus to Lewis because his right to confrontation was violated at trial by the exclusion of portions of the alleged rape victim's diary. As a result, he was prevented from conducting adequate cross-examination.

Lewis was convicted of raping Christina Heaslet. Both were students at the University of Akron and were friends. In fact Heaslet testified that she was attracted to Lewis, but did not want a relationship with him because he was a flirt. One night, Heaslet invited Lewis to her dorm room. They watched TV and listened to music. Heaslet drank some wine coolers. At one point, Lewis turned off the lights. Heaslet testified that Lewis grabbed her and threw her on the bed and took off her clothes. Lewis then took off his clothes and put on a condom. Heaslet told the jury that Lewis pushed her down repeatedly, and forced her legs apart, despite the fact that she told him "don't do this." Lewis penetrated her. Lewis testified at trial that sex was consensual and Heaslet never said anything during intercourse.

The condom and wrapper were thrown in the trash. Heaslet accompanied Lewis to the first-floor of the dorm and signed him out at the front desk. Heaslet then went to the dorm coordinator who called the police. Lewis was arrested. He waived his *Miranda* rights and said sex was consensual.
Several weeks prior to trial, Lewis received an envelope in the mail from an anonymous source. In the envelope were 4 excerpts from Heaslet's diary. Defense counsel sought to cross-examine Heaslet on those excerpts, arguing that they were relevant to Heaslet's veracity, motive to lie, and her consent. In one excerpt, for example, Heaslet wrote that she felt "sort of" guilty for setting Lewis up and that she did it because she "need[ed] some drama" in her life. Citing the Ohio Rape Shield Law, the trial court would not allow defense counsel to introduce the following language at trial: ". . . and I'm sick of myself for giving in to them. I'm not a nympho like all those guys think. I'm just not strong enough to say no to them. I'm tired of being a whore. This is where it ends." Defense counsel's argument was that this implied that she did consent to sex with Lewis and that she framed him because she was sick of men using her. The State argued that the language contained opinion and reputation evidence of the victim's past sexual activity and was protected under the rape shield law, and the trial court agreed.

Rape Shield Law vs. Defendant's Right to Cross-Examine Victim. The sixth amendment right of confrontation includes the right to conduct reasonable cross-examination. *Davis v. Alaska*, 415 U.S. 308 (1974). It is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.*, 415 U.S. at 316. However there are limits on this right. The 6th Circuit has stated "the sixth amendment only compels cross-examination if that examination aims to reveal the motive, bias, or prejudice of a witness/accuser." *Boggs v. Collins*, 226 F.3d 728, 740 (6th Cir. 2000).

Ohio's Rape Shield Law bars evidence "of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity" unless (1) it involves the origin or semen, pregnancy, or disease or (2) it involves past sexual activity with the offender and it is material to the case, and the inflammatory nature does not outweigh probative value. In the case at bar, the trial court found that the evidence involved opinion evidence of the victim's sexual activity and, even if the evidence was allowed, would be unduly prejudicial.

The 6th Circuit holds that the trial court erred in that the diary excerpt was evidence of consent and motive. When confronted with evidence relating to motive of the witness being excluded from trial, the reviewing court must undertake a 2-prong test. *Boggs*, at 739. First it "must assess whether the jury had enough information" from other sources to consider the defense theory of improper motive. If cross-examination was denied or diminished, the Court must apply a balancing test, weighing the violation against the interests at stake. In the case at bar, the Court concludes that without the diary entry at issue, the jury did not have enough information to consider the theory of improper motive and consent. While the state does have an interest in protecting rape victims so as to encourage reporting, the trial court could have given a limiting instruction when the evidence was introduced.

Continued on page 58

Continued from page 57

Griffin v. Rogers
308 F.3d 647 (6th Cir. 10/18/02)

AEDPA Statute of Limitations Not Tolled While Federal Habeas Petition Pending. This is a case involving the AEDPA statute of limitations. Griffin filed her petition for writ of habeas corpus on April 22, 1997, 2 days before her one-year period for filing expired. On September 30, 1998, the district court dismissed that petition without prejudice because Griffin had filed to exhaust state remedies. The period of time between April 22, 1997 and September 30, 1998, is not tolled because *Duncan v. Walker*, 533 U.S. 167, 180 (2001), holds that the statute of limitations is not tolled while a federal habeas petition is pending. Griffin petitioned for state post-conviction relief, and the Ohio Supreme Court dismissed the case, without opinion, on September 22, 1999. On October 15, 1999, Griffin again filed her habeas petition under the same filing number as before. The district court judge struck the petition on the grounds it needed a new number and a new judge. On October 25, 1999, it was assigned to a new judge, who ultimately dismissed the petition as time-barred.

Equitable Tolling Might Be Appropriate When Time Runs While Federal Habeas Petition Pending. The Court notes that in *Duncan*, 533 U.S. at 182-183, the concurrence endorsed equitable tolling as a way to grant relief to petitioners whose statute of limitations has run during the pendency of the federal habeas petition. In *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002), the 6th Circuit endorsed equitable tolling in the exact situation present in the case at bar, *i.e.* when a petitioner filed her petition within the one-year statute of limitations but it was dismissed without prejudice in order to exhaust state claims after the one-year statute of limitations has run. In *Palmer*, the 6th Circuit found that equitable tolling was appropriate if the petitioner did return to state court, normally within 30 days of the dismissal in federal court, and returned to federal court after losing in state court within 30 days. *Id.*, 781.

In Determining Whether Equitable Tolling is Appropriate, State Must Help Petitioner Access State Court Records. Thus, the Court focuses on Griffin's diligence in exhausting state remedies and returning to federal court. While the federal district court dismissed the petition on September 30, 1998, the record fails to establish when Griffin filed her application to reopen her case in state court. While Griffin does have the burden of proving that she is entitled to equitable tolling, *Dunlap v. U.S.*, 250 F.3d 1001, 1003 (6th Cir. 2001), the Court notes that the State has better access to state court records. Furthermore, in the case at bar, the State failed to comply with Rule 5 of the Rules Governing Section 2254 cases, by providing a copy of petitioner's appellate briefs and the appellate decisions with its answer. Thus, the Court remands this case to district court for it to determine whether Griffin's application to reopen state court proceedings was filed within 30 days of the federal court's dismissal.

Time for Petitioning U.S. Supreme Court for Writ of *Certiorari* of State Direct Appeal Opinion Tolls AEDPA Statute of Limitations. The Court holds that Griffin returned to federal court in a timely manner. Her state court proceedings concluded on September 22, 1999, when the Ohio Supreme Court dismissed her case. While erroneously filed under the old case number, Griffin did actually return to court on October 15, 1999, not October 25, 1999, as argued by the state, the date when the pleading was filed under a new case number and assigned to a different judge. Furthermore, Rule 26(B) motions to reopen a case are considered to be part of Ohio's direct appeal process, *White v. Schotten*, 201 F.3d 743, 752 (6th Cir.), *cert. denied*, 531 U.S. 940 (2000), and Section 2244(d)(1) provides that time for seeking direct review includes the 90 days in which one can file a petition for a writ of *certiorari* to the U.S. Supreme Court. Griffin actually did not have to return to federal court until 90 days after September 22, 1999, when the Ohio Supreme Court dismissed her case.

Abela v. Martin
309 F.3d 338 (6th Cir. 10/30/02)

Despite the fact that it seems clear that Abela's fifth amendment rights were violated by post-arrest interrogation without counsel (Abela requested the police call a specific attorney, the police failed to do, and continued questioning Abela), the Court of Appeals holds that Abela's habeas petition is time-barred under Section 2244(d)(1) and dismisses the petition.

Court has Federal Habeas Corpus Jurisdiction When Petitioner Files Petition While on Parole, Even if Petitioner is Off Parole When Court Considers Case. Before addressing whether the AEDPA statute of limitations bars this petition, the Court notes that it has subject matter jurisdiction in this case because Abela filed this petition while he was on parole. A petitioner on parole satisfies the "in custody" requirement the AEPDA "because is release is not unconditional—the parolee is required to report regularly to his parole officer, remain at a given job, residence and community and refrain from certain activities." *Jones v. Cunningham*, 371 U.S. 236, 242 (1963). Furthermore, this action is not mooted by the fact that Abela has now been released from parole. "Even where [the petitioner] is later released before the petition is considered, he will satisfy the case or controversy requirement. . . because of the continuing collateral consequences to a wrongful criminal conviction." *Spencer v. Kemna*, 523 U.S. 1, 9 (1998). Those collateral consequences include the inability to enter certain businesses, vote, or be a juror or elected official.

State Post-Conviction Action Pending Even During Intervals Between One State Court's Judgment and Filing of a Notice of Appeal in Higher State Court. Abela's conviction was final before the passage of the AEDPA so his time began to run on April 24, 1996. On August 20, 1996, Abela filed a petition for relief from judgment (this is equivalent to the

state post-conviction process in Kentucky, *i.e.* RCr 11.42 motion). This tolled the running of time until May 28, 1998, when the Michigan Supreme Court rejected the motion. The Court notes the Supreme Court's recent decision that a state post-conviction action is "pending" for the entire term of state court review. This includes the intervals between one state court's judgment and the filing of a notice of appeal to a higher state court. *Carey v. Saffold*, 122 S.Ct. 2134, 2138 (2002).

State Post-Conviction Review Ends Once Highest State Court Has Ruled. Furthermore, the Court holds that there is no tolling of time for the period in which Abela filed a petition for writ of *certiorari* of the Michigan Supreme Court's denial of his state post-conviction motion. *Duncan v. Walker*, 533 U.S. 167 (2001) and *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000), *cert. denied*, 531 U.S. 1201 (2001). In other words, state post-conviction review—which does toll the Section 2244(d) statute of limitations—ends once the state's highest court has ruled.

Short takes:

U.S. v. Leachman, 309 F.3d 377 (6th Cir. 10/9/02): The 6th Circuit recognizes the U.S. Supreme Court's overruling of the 6th Circuit decision, *U.S. v. Flowal*, 234 F.3d 932 (6th Cir. 2000), that applied *Apprendi v. N.J.*, 530 U.S. 466 (2000), to mandatory minimum sentences. The 6th Circuit was the only circuit to apply *Apprendi* to mandatory minimum sentences so as to require that factors that increase a sentence beyond the statutory mandatory minimum be proven to a jury beyond a reasonable doubt. In *Harris v. U.S.*, 122 S.Ct. 2406 (2002), the Supreme Court resolved the circuit split and held that factors increasing the mandatory minimum are not elements but "mere sentencing factors not entitled to the same constitutional protections." This decision, in effect, reconciles *Apprendi* and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), so that *McMillan*, which allowed state judges to find minimum penalty enhancement factors by a preponderance of the evidence, is still good law. In *Leachman*, the 6th Circuit overrules *Flowal* and all other cases before the circuit in which it has held that *Apprendi* applies to mandatory minimum sentences.

U.S. v. Bartholomew et al., 2002 WL 31527453 (6th Cir. 11/15/02): The defendants challenged, under *Batson v. Kentucky*, 476 U.S. 79 (1986) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the removal of 3 African-American female jurors from the venire panel. The 6th Circuit finds the removal of 2 venire persons, Adams and Chatmon, to be legitimate because these women had relatives in the criminal justice and the "prosecutor's suspicion that they would not be impartial jurors" is warranted. The Court also finds that the removal of venire person Hicks is nondiscriminatory. The prosecutor removed her because she "had a loud voice, was physically large, and impressed the prosecutor as a highly opinionated person." The Court determines that the prosecutor's motives were nondiscriminatory in part because the final makeup of the jury included a majority-female jury that included 2 African-Americans.

Castro v. U.S., 2002 WL 31506943 (6th Cir. 11/13/02): In this case the 6th Circuit emphasizes that when a petitioner, pursuant to a 28 U.S.C. Section 2255 motion, files a notice of appeal from the district court judgment, the district court "must either issue a certificate of appealability or state why a certificate should not issue." Fed. R. App. P. 22(b)(1). The petitioner need not file a motion for a certificate of appealability; the notice of appeal is enough to trigger the district court's responsibility.

U.S. v. Cope, 2002 WL 31548782 (6th Cir. 11/19/02): Randall Cope and his brother Terry Cope were convicted of attempted murder and firearm violations. On direct appeal to the 6th Circuit, Randall claims that his sixth amendment rights were violated when evidence was introduced that was obtained through jail cellmates and government informants. The Court rejects this claim. Randall was in jail on internet harassment and credit card fraud charges when he made the incriminating statements about his role in the attempted murder cases. Official judicial proceedings related to the attempted murder charges did not commence until after he had made the statements to the informants. "[T]he fact that law enforcement officials arranged for an informant to converse with an indicted defendant about offenses other than those for which the defendant has been indicted is not unlawful." *U.S. v. Ford*, 176 F.3d 376 (6th Cir. 1999). Furthermore statements made by Randall to the informants do not violate his fifth amendment rights because the fifth amendment does not apply to noncoercive conversations with undercover informants. *Illinois v. Perkins*, 496 U.S. 292 (1990). Finally, the government's working with confidential informants does not violate the ABA Code of Professional Responsibility Disciplinary Rule 7-104 that provides that a lawyer shall not "communicate or cause another to communicate on the subject to the representation with a party he knows to be represented by a lawyer. . . unless he has the prior consent of the [other] lawyer." ■

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CAPITAL CASE REVIEW

SIXTH CIRCUIT

***House v. Bell*, — F.3d — (6th Cir. , November 22, 2002)**
Majority: Merritt (writing), Martin, Daughtrey, Moore, Cole, Clay
Minority: Boggs (writing), Norris, Siler, Batchelder Gilman (writing)

In this "actual innocence"/ "miscarriage of justice"[1] case, the *en banc* Sixth Circuit certified several questions of law to the Tennessee Supreme Court:

1. When the Tennessee Supreme Court finds error in the presentation of an aggravating factor to a jury, and the remaining aggravators are disproven by new DNA evidence, does a defendant lose his current eligibility for the death penalty under state law and require a new sentencing hearing?

2. If under Tennessee law a jury must weigh the aggravating and mitigating circumstances, and the Supreme Court of Tennessee on review then proceeds to consider the reasonableness of the weighing process, does the Court's review process now permit it to remedy any error in the weighing process by the jury in light of newly discovered evidence?

3. Does Tennessee law require a new trial when newly discovered evidence of actual innocence, a significant part of which is in the form of DNA evidence *which could not be discovered* at the time of trial, creates a serious question or doubt that the defendant is guilty of first degree murder?

Three aggravators were found: 1) heinous atrocious and cruel; 2) murder in the course of rape; 3) previous felony conviction. New DNA[2] evidence proved that the victim's husband, not House, was the donor of the sperm found on the victim's clothing "seriously affect[ed]" aggravators 1) and 2).

The Tennessee Supreme Court found error in admission of the third aggravator, but found it harmless, based upon the rape evidence. Tennessee law at the time defined murder "as an unlawful killing 'with malice aforethought, either express or implied.'" The new DNA evidence also undermined the state's only argument regarding House's motive for the crime.

DISSENT

Judge Boggs and his brethren believed that the majority engaged only in a delaying tactic and should have answered the "one question that should be before it: Would some reasonable juror believe that Paul House committed first degree murder and should be subject to the death penalty?" *Slip op*. at 13.

DISSENT (Gilman)

Judge Gilman took a middle ground. He agreed with the majority that House presented a strong claim for relief, at least as to sentencing. He disagreed with the decision to certify three questions to the Tennessee Supreme Court, and believed that the majority should have decided the case on the merits as put before it.

Judge Gilman also found "particularly disturbing" Judge Boggs' interpretation of the *Schlup* standard as a merely statistical analysis.

***DePew v. Anderson*, — F.3d —**
(6th Cir. November 20, 2002)
Majority: Merritt (writing), Gilman)
Minority: Batchelder (writing)

This pre-AEDPA case concerns the jury's ability to actually consider mitigating evidence under *Lockett v. Ohio*, 438 U.S. 586 (1978). At the penalty phase, DePew presented only one mitigating factor: that he was a peaceful person with no prior criminal history and had acted in the "heat of passion" in killing three people who were in a home he meant only to burglarize. DePew took the stand during the penalty phase and, as permitted by Ohio law, gave an unsworn statement.

The prosecutor's behavior took away the jury's ability to perform its sentencing function. He implied that DePew previously had been involved in a knife fight, for which there was no basis in fact. He showed a picture to the jury of someone, not even identified as DePew, standing next to a marijuana plant. Finally, he commented in closing that the reason why DePew would not give sworn testimony was to prevent the prosecutor from asking about a subsequent conviction. *DePew*, slip op. at 7.

The Ohio Supreme Court found harmless the prosecutor's comment on DePew's refusal to testify at the penalty phase. *Id*., citing *Griffin v. California*, 380 U.S. 609 (1985). The Sixth Circuit took issue with the harmlessness angle, pointing out that the state court's decision wasn't "precisely" based on harmlessness, but on the interest of the public in seeing that the criminal justice system work effectively. "The public's, or the voter's, feelings in favor of capital punishment for brutal crimes are a well-known part of our political tradition, but these feelings cannot rise above or displace constitutional provisions insuring a fair trial." *DePew*, slip op. at 8. This majority, at least, believes the United States Supreme Court's pronouncements that "death is different."

OTHER ISSUES

Newspaper articles before and after DePew's trial began were very critical of the LWOP sentence in another murder case.

The trial judge wrote a letter to the local newspaper blaming the Ohio legislature for the earlier sentence, saying it put too many roadblocks in the way of prosecutors seeking the death penalty. After he denied DePew's Motion to Suppress, the judge was quoted as whatever doubts he had about cases, especially in Fourth Amendment issues, would be resolved in favor of law enforcement.

DePew argued that the judge's findings of fact, particularly in his decision not to suppress evidence, were not due the presumption of correctness. The Court found the judge's letter was one of the "political realities" caused by his contested race for reelection, but not an indication that he would not make decisions based upon the law.

The Court was more troubled by the judge's letter to the editor, but again, found no bias. The Court did use its decision to call into question a system which requires election of judges who later must preside over capital cases—and to remind federal judges of their continuing obligation to be diligent in reviewing the most politically "hot" cases: those in which a person has been sentenced to death.

DISSENT

Judge Batchelder did not believe that the prosecutor's comment so infected the trial as make out a denial of due process. Although the comment about DePew's knife fight tended to mislead the jury, the judge "cured" the error. DePew himself talked about using illegal drugs in his confession, which was played for the jury. Lastly, DePew opened the door by drawing the jury's attention to the fact that DePew did not give sworn testimony. Interestingly, the judge does not address the fact that once the bell is rung, it cannot be "unrung."

***Esparza v. Mitchell*, — F.3d —**
(rendered November 5, 2002)
Majority: Merritt (writing), Daughtrey
Minority: Suhrheinrich (writing)

In this case decided after *Ring v. Arizona*, 122 S.Ct. 2428 (2002), neither the indictment, jury instructions or verdict contained any language regarding an aggravating circumstance making Esparza a member of the "narrow class" of persons eligible for the death penalty. The Ohio state courts *sua sponte* found Esparza guilty of being the principal actor in a murder in the commission of a robbery.

The panel affirmed the grant of sentencing phase relief on the ground that Esparza's death sentence violated the Eighth Amendment because the trial court imposed it without complying with Ohio's statutory requirement that the jury find the aggravating factor necessary to narrow the class of death-eligible offenders.

The error was not subject to harmless error analysis because harmless error review could only apply when the jury actually performed its Eighth Amendment function: reaching a verdict on all the elements of the crime. The jury which sentenced Esparza to death did not have the tools necessary to do this job. The State's argument that the error here could be excused as harmless would lead to the opposite: that judges may supply an element of capital punishment.

The majority also noted that even if it were appropriate, new evidence discovered while the case was in the federal district court would disallow harmless error analysis in this case. That new evidence indicated suppression of information suggesting that Esparza was not the lone actor, in direct contravention to the prosecution's theory at trial.

DISSENT

Judge Suhrheinrich believed that the error in this case could have been harmless. Further, he believed that Esparza had not met his burden to prove the Ohio Supreme Court's opinion was "contrary to" or "an unreasonable application"[3] of Supreme Court precedent.

ENDNOTES:

1. *Schlup v. Delo*, 513 U.S. 298 (1995)
2. House was convicted and sentenced to death for a 1985 murder.
3. *See Williams v. Taylor*, 529 U.S. 362 (2000). ■

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PRACTICE CORNER
LITIGATION TIPS & COMMENTS


Misty Dugger

CR 75.07 Requires Jury Strike Sheets be Included in Record on Appeal

Inclusion of jury strike sheets in the record is essential to proper preservation because Kentucky case law requires exhaustion of strikes in order to preserve many claims of error during jury selection. Yet some Circuit Clerks appear to be unaware that CR 75.07(4) requires that jury strike sheets be included as part of the record on appeal. Check your record to make sure they are included. If not, call the Clerk and ask where they are so that you can supplement your record. If you run into a situation where the Circuit Clerk tells you that strike sheets are routinely NOT included as part of the record on appeal, please contact Dennis Stutsman, Appellate Branch Manager, at (502) 564-8006.

~ Julia K. Pearson,
Capital Post-Conviction Branch, Frankfort

Jury Instruction Conferences Must Be on the Record

Make sure any and all discussions regarding the instructions are done ON THE RECORD! Instruction conferences are often done in chambers or outside the presence of the jury and thus may not be recorded by the video recording systems. If the conference is not recorded, the objections may not be clearly set out on the record and will make appellate arguments more difficult to win because your position may not be clear from the record. Please do not leave your position open to speculation that may end up going against your client. If there is no video recording equipment available when the discussion occurs, when you return to the courtroom please state your position clearly on the record. Always tender proposed jury instructions, object to instructions not given, and make certain the jury instruction conference is on the record.

~ Julie Namkin, Capital Appeals Branch, Frankfort

Remember to Include all Portions of the Trial Proceeding in the Designation of Record

In transcript counties, do not forget to designate the *voir dire*, opening statements and closing statements as part of your designation of record. Pursuant to C.R. 75.02, these portions of the trial are not automatically included in the record without specific designation.

~ John Palombi, Appeals Branch, Frankfort

Inconsistent Verdict Claims Require Specific Preservation To Assure Appellate Review

The Court of Appeals rejected a claim of substantive error based upon an inconsistent verdict in a felony drug case because the issue was not properly preserved by trial counsel in *Maxie v. Commonwealth*, Ky. App., 2001-CA-001892-MR, (July 26, 2002) (Unpublished and Not Yet Final), *mtn. for discretionary rev. pending*, 02-SC-000698-D. Appellant Maxie was indicted on charges of first-degree trafficking in a controlled substance and tampering with physical evidence. The jury was instructed on first-degree trafficking in a controlled substance, first-degree possession of a controlled substance, and tampering with physical evidence. The jury found Maxie ***not guilty*** of the trafficking or possession charges, but ***guilty*** of the tampering charge. On appeal, Maxie asserted that the trial court erred by allowing the jury to return inconsistent verdicts. Maxie argued that it was irrational and erroneous for the jury to have found that he tampered with something he never possessed. However, the Court of Appeals refused to review the alleged error because trial counsel did not preserve it: "The issue raised by appellant on appeal was not preserved for our review. In *Caretenders, Inc. v. Commonwealth*, Ky., 821 S.W.2d 83 (1991), our Supreme Court discussed the procedure regarding appellate review of unpreserved inconsistent verdict claims. The Court stated that when an allegation about an inconsistent verdict involves a defect which is "merely formal," the matter must be brought to the trial court's attention before the jury is discharged or the defect is waived. *Id.* at 85. However, "[i]f the defect is one of substance, the error may be raised after the jury has been discharged such as in a motion for new trial." *Id.* In the present case, the defect alleged by appellant would be considered substantive. However, appellant neither brought the alleged error to the attention of the trial court before the jury was excused, nor in a post-trial motion. Hence, the alleged error was clearly not preserved for our review."

~ Misty Dugger, Appeals Branch, Frankfort

Practice Corner needs your tips, too. If you have a practice tip to share, please send it to Misty Dugger, Assistant Public Advocate, Appeals Branch, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky, 40601, or email it to mdugger@mail.pa.state.ky.us. ■

Public Advocacy Seeks Nominations for Awards

We seek nominations for the Department of Public Advocacy Awards which will be presented at this year's 31st Annual Conference in June. An Awards Search Committee recommends two recipients to the Public Advocate for each of the following awards. The Public Advocate then makes the selection. Contact Lisa Blevins at 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601; Tel: (502) 564-8006 ext. 294; Fax: (502) 564-7890; or Email: lblevins@mail.pa.state.ky.us for a nomination form. **All nominations are to be submitted on this form by April 3, 2003.**

Gideon Award: Trumpeting Counsel for Kentucky's Poor

In celebration of the 30th Anniversary of the U.S. Supreme Court's landmark decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Gideon* Award was established in 1993. It is presented at the Annual Conference to the person who has demonstrated extraordinary commitment to equal justice and who has courageously advanced the *right to counsel* for the poor in Kentucky. Clarence Earl Gideon was denied counsel and was convicted. After his hand-written petition to the U.S. Supreme Court, he was acquitted upon retrial where he was represented by counsel.

1993 **J. Vincent Aprile, II**, DPA acting General Counsel
1994 **Dan Goyette**, Director of the Jefferson County District Public Defender's Office and the Jefferson District Public Defender's Office
1995 **Larry H. Marshall**, Assistant Public Advocate in DPA's Appellate Branch
1996 **Jim Cox**, Directing Attorney, DPA's Somerset Office
1997 **Allison Connelly**, Assistant Clinical Professor, UK, former Public Advocate
1998 **Edward C. Monahan**, Deputy Public Advocate
1999 **George Sornberger**, DPA Trial Division Director
2000 **John P. Niland**, former DPA Central Regional Manager
2001 **Ann Bailey-Smith**, Chief Trial Attorney, Louisville-Jefferson County Public Defender Corporation, Adult Division
2002 **Teresa Whitaker,** Directing Attorney, Columbia Office

ROSA PARKS AWARD: FOR ADVOCACY FOR THE POOR

Established in 1995, the *Rosa Parks* Award is presented at the Annual DPA Public Defender Conference to the non-attorney who has galvanized other people into action through their dedication, service, sacrifice and commitment to the poor. After Rosa Parks was convicted of violating the Alabama bus segregation law, Martin Luther King said, "I want it to be known that we're going to work with grim and bold determination to gain justice... And we are not wrong.... If we are wrong justice is a lie. And we are determined...to work and fight until justice runs down like water and righteousness like a mighty stream."

1995 **Cris Brown**, Paralegal, DPA's Capital Trial Branch
1996 **Tina Meadows**, Executive Secretary to Deputy, DPA's Education & Development
1997 **Bill Curtis**, Research Analyst, DPA's Law Operations Division
1998 **Patrick D. Delahanty,** Chair, Kentucky Coalition Against the Death Penalty
1999 **Dave Stewart**, Department of Public Advocacy Chief Investigator, Frankfort, KY
2000 **Jerry L.Smothers, Jr., Investigator, Jefferson County Public Defender Office, Louisville, KY**
2001 **Cindy Long**, Investigator, Hopkinsville
2002 **Peggy Bridges,** Mitigation Specialist, Paducah

NELSON MANDELA LIFETIME ACHIEVEMENT AWARD

Established in 1997 to honor an attorney for a lifetime of dedicated services and outstanding achievements in providing, supporting, and leading in a systematic way the increase in the right to counsel for Kentucky indigent criminal defendants. Nelson Mandela was the recipient of the 1993 Nobel Peace Prize, President of the African National Congress and head of the Anti-Apartheid movement. His life is an epic of struggle, setback, renewal hope and triumph with a quarter century of it behind bars. His autobiography ended, "I have walked the long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb... I can rest only for a moment, for with freedom come responsibilities, and I dare not linger, for my long walk is not yet ended."

1997 **Robert W. Carran**, Attorney, Covington, KY, former Kenton County Public Defender Administrator
1998 **Col. Paul G. Tobin**, former Executive Director of Jefferson District Public Defender's Office *Continued on page 64*

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1999 **Robert Ewald**, Chair, Public Advocacy Commission
2000 **John M. Rosenberg**, A.R.D.F. Director, Public Advocacy Commission Member
2001 **Bill Johnson**, Frankfort Attorney, Johnson, Judy, True & Guarnieri, Public Advocacy Commission Member
2002 **Jerry Cox,** Attorney,

IN RE GAULT AWARD: FOR JUVENILE ADVOCACY

This Award honors the person who has advanced the quality of representation for juvenile defenders in Kentucky. It was established in 2000 by Public Advocate, Ernie Lewis and carries the name of the 1967 U.S. Supreme Court case that held a juvenile has the right to notice of changes, counsel, confrontation and cross-examination of witnesses and to the privilege against self-incrimination.

1998 **Kim Brooks**, Director, N. Ky. *Children's Law Center, Inc.*
1999 **Pete Schuler**, Chief Juvenile Defender, Jefferson District Public Defender Office
2000 **Rebecca B. DiLoreto**, Post-Trial Division Director
2001 **Gail Robinson**, Juvenile Post-Disposition Branch Manager
2002 **patti echsner,** Louisville-Jefferson County Public Defender Corporation

PROFESSIONALISM & EXCELLENCE AWARD

The *Professionalism & Excellence Award* began in 1999. The President-Elect of the KBA selects the recipient from nominations. The criteria is the person who best emulates Professionalism & Excellence as defined by the 1998 Public Advocate's Workgroup on Professionalism & Excellence: *prepared and knowledgeable, respectful and trustworthy, supportive and collaborative. The person celebrates individual talents and skills, and works to insure; high quality representation of clients, and takes responsibility for their sphere of influence and exhibits the essential characteristics of professional excellence.*

1999 **Leo Smith**, Deputy, Jefferson Co. Public Defender Office
2000 **Tom Glover,** DPA Western Regional Manager
2001 **Don Meier,** Assistant Public Advocate, Jefferson Co. Public Defender Office
2002 **Ernie lewis,** Public Advocate

ANTHONY LEWIS MEDIA AWARD:

Established in 1999, this Award recognizes in the name of the *New York Times* Pulitzer Prize columnist and author of *Gideon's Trumpet* (1964), the media's informing or editorializing on the crucial role public defenders play in providing counsel to insure there is fair process which provides reliable results that the public can have confidence in. **Anthony Lewis**, himself, has selected two recipients to receive the Award named in his honor in its first year, 1999:

1999 **Jack Brammer**, *Lexington Herald Leader*, March 5, 1999 article, "The Case of Skimpy Salaries: Lawyers for poor make little in Ky." **and David Hawpe**, Editorial Director, and ***The Courier Journal*** for their history of coverage of counsel for indigent accused and convicted issues from funding to the death penalty.
2000 **Robert Ashley**, Editor, *The Owensboro Messenger*
2001 **Joel Pett**, Editorial Cartoonist, *Lexington Herald-Leader*
2002 **sara shipley and john adams,** ***The Courier Journal***

FURMAN CAPITAL AWARD

Established in 2000 by Public Advocate Ernie Lewis, it honors the person who has exhibited outstanding achievements on behalf of capital clients either through litigation or other advocacy. William Henry Furman's name appears in the landmark decision, *Furman v. Georgia*, 408 US 346 (1972) which abolished capital punishment in the nation for four years. Furman was a 26 year old African-American who had mental limitations and who finished the 6th grade. Today, Furman lives and works in Macon, Ga.

2000 **Stephen B. Bright**, Director for the Southern Center for Human Rights, Atlanta, Georgia
2001 **Mark Olive**, Attorney, Tallahassee, Florida, Habeas Assistance and Training Counselor
2002 **kevin mcnally,** Attorney, Frankfort, Kentucky

Review of Juvenile and Youthful Offender Caselaw

Juvenile cases reviewed each issue. Currently, we have reviewed competency, confessions and sentencing. In this edition we will review access to the press, involuntary hospitalization and blood testing.

Access of Press

U.S. Supreme Court:

Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S.Ct. 2667 (1979). West Virginia had a statute making it a crime to publish (without the written permission of the juvenile court) the name of an individual charged as a juvenile offender. The U.S. Supreme Court narrowly held that imposing criminal sanctions for the truthful publishing of the name (lawfully obtained) of one charged as a juvenile offender is unconstitutional, violating the 1st and 14th Amendments.

Oklahoma Pub. Co. v. District Court In and For Oklahoma County, 430 U.S. 308, 97 S.Ct. 1045 (1977). Oklahoma statute required juvenile proceedings to be closed to the public unless specifically opened by the court. In this case, no specific order was given by court, but members of the press attended without court's objection or objection of either party. Court enjoined press from printing name and photos of juvenile. Held this injunction violated 1st and 14th Amendments. Court stated that because public and press were present at trial without objection, the proceedings were therefore "open" and accounts may be printed.

U.S. Circuit Courts:

U.S. v. A.D., 28 F.3d 1353 (3d Cir. 1994). Federal juvenile delinquency proceedings under Federal Juvenile Delinquency Act (JDA). JDA has confidentiality section, disallowing the unauthorized disclosure of information regarding delinquency proceedings. General 1st Amendment right of public access to criminal proceedings is "not absolute"—information regarding juveniles should be subject to special sensitivity. Focus of juvenile proceeding is rehabilitation, not punishment; wide publicity describing the crime, face, "criminality" of the juvenile works against rehabilitation, to an extent dependant upon the individual. Held: denial or limitation of access to *records* is in the discretion of the judge, but must be justified by factual findings particular to the case at hand. *this is 3d Circuit review of federal JDA case; compare with KY case *Johnson v. Simpson.*

Kentucky:

F.T.P. v. Courier-Journal, Ky., 774 S.W.2d 444 (1989). Juvenile court entered order finding transfer statute unconstitutional. Commonwealth appealed to circuit court. Press could be excluded from access to records and from appellate review of juvenile court order. Decided under First Amendment and Section 8, Kentucky Constitution.

Rebecca DiLoreto

Johnson v. Simpson, Ky., 433 S.W.2d 644 (1968). Judge excluded certain members of the press from attending trials in the "adult branch" of juvenile court after reporters printed the names of juvenile witnesses against orders of the judge. This case taken from appeal of mandamus proceeding against judge prohibiting him from excluding specific reporters from court. Two issues addressed by Kentucky Supreme Court: (1) whether a judge may exclude certain members of the public from trials in the "adult branch" of juvenile court, and (2) whether a judge may restrict certain persons from attending juvenile hearings. Court held (1): adult branch cases in juvenile court (*e.g.* contributing to delinquency) are public trials and therefore the public and press (providing account to public unable to attend) have a right to attend. Special considerations may be made for juvenile witnesses giving sensitive testimony. However, if the ability to prevent names of juvenile witnesses from being published is to be given to a judge, it must be provided by the legislature (as some states have legislation preventing the name of a rape victim from being published); (2): When meetings were open to a portion of the public, they became public hearings. Judge had no discretion to prevent only specific members of the public from attending. By statute, the general public must be excluded from juvenile proceedings. At time of case K.R.S. § 208.060, repealed, now Ky. Rev. Stat. Ann. § 610.070 (Banks-Baldwin 2002). Court leaves it to legislature to open or conditionally open judicial proceedings.

Admission to Mental Hospital

Parham v. J.R.., 442 U.S. 584, 99 S.Ct. 2493 (1979). Minor children brought action alleging that they and other class members had been deprived of their liberty without procedural due process by virtue of mental health laws which permitted voluntary admission of minor children to mental hospitals by parents or guardians. The Supreme Court, while ruling that statutory provisions for admission are reasonable and consistent with constitutional guarantees, held that risk of error inherent in parental decision to have child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a "neutral fact-finder" to determine whether statutory requirements for admission are satisfied. Inquiry must carefully probe child's background, using all available resources. Decision maker must have authority to refuse to admit child who does not satisfy medical standards for admission, child's continuing need for commitment must be reviewed periodically by similarly independent procedure. *see KRS Chapter 645 enacted in 1986. *Continued on page 66*

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Johnson v. Solomon, 484 F.Supp. 278 (D. Md. 1979). Class action on behalf of 76 juveniles confined in mental institutions. (1) Commitments were unlawful due to unconstitutional commitment standards set out by Maryland statute. Specifically, void because too vague to deny liberty. Law sets out rules by which one parent/guardian can request commitment, or commitment may be ordered by Juvenile Court. Argued that there should be some sort of objective findings for the need of commitment (specifically, a finding of "dangerousness") prior to commitment, as is the standard with adult commitment cases. Argued that the lack of findings is a violation of due process. The court quoted *Jackson v. Indiana*, 406 U.S. 715, 738 (1972): "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." Court held Maryland's JCA commitment standards unconstitutionally vague and violate due process. (2) Argued that lack of mandatory period of review for commitments violated due process and equal protection. Review must be initiated by parent, guardian, or committed individual (who may be on medication, unaware of procedure, etc.). Following *Parham v. J.R.*, 442 U.S. 584 (1979), the court held that a mandatory period of review is necessary to prevent arbitrariness in commitment. (3) juveniles argued that they had a right to counsel prior to commitment and at any rehearings. The court said "no juvenile shall hereafter be involuntarily committed to a Maryland mental hospital unless counsel has been provided. Furthermore, counsel must also be present at the time of any redetermination, such as the mandatory six-month review discussed in the preceding section." *Johnson*, at 294. (4) juveniles argued that they have a right to care in the least restrictive setting possible (must weigh treatment with liberty interests.) Purpose of involuntary hospitalization is treatment, not confinement/punishment. State argued that due process clause only requires reasonable relation to legitimate state interest. Court provided detailed rules (in appendix of case) to allow for reasonable care.

Blood/DNA Testing

State Courts

L.S. v. State, 805 So.2d 1004 (Fla. Dist. Ct. App. 2001).
Fla. Stat. ch. 943.325(2001) required the submission of blood samples for DNA evidence of any person (juvenile or adult) found guilty, pled *nolo contendere*, etc. of enumerated offenses. Here juvenile pled *nolo contendere* to burglary, an enumerated offense. State requested compelled blood sample. Juvenile argued statute violated 4th, 5th, and 8th amendments via the 14th ensuring right of privacy, due process, etc. Held not unreasonable search and seizure or intrusion of privacy. Conviction/adjudication brings lowered expectations of privacy rights. No equal protection problem because legislature's findings and decision reasonable & their application to juveniles also reasonable.

Theodore v. Delaware Valley School Dist., 761 A.2d 652 (Pa.2000). Students and their parents filed complaint seeking to prevent school district from testing students under its policy of drug and alcohol testing as a condition of extracurricular participation and of obtaining driving and parking privileges. The Court dismissed the complaint. Students and parents appealed. The Court held that: (1) policy violated students' privacy rights, but (2) policy did not violate parents' privacy rights or parental rights

Matter of Welfare of J.W.K., 583 N.W.2d 752 (Minn. 1998).
Juvenile (JWK) and parent consented to blood test to be used in comparison with evidence found at the crime scene of a specific burglary. Blood test did not match evidence found. Detective signed blood sample over to another detective interested in the blood evidence for another, earlier burglary. JWK's blood sample matched blood evidence found at earlier crime scene. Faced with blood evidence, JWK confessed to earlier burglary. JWK moved to suppress confession as the fruit of evidence obtained from non-consensual use of his blood sample. General 4th Amendment search & seizure rule prevents police from using private blood without consent, absent probable cause. (e.g. blood alcohol content's fairly rapid decay denies authorities time to find magistrate and get warrant.) Here there were no circumstances validating a warrantless search. (DNA, unlike alcohol, is not only obtainable within a short window of time.) Further, the consent given was specifically for comparative analysis to evidence found at the initially investigated (later) burglary. But held, inevitable discovery exception to 4th Amendment applies here; if done "properly," consent would either have been obtained, or, due to other evidence linking JWK to the first burglary, a warrant for the blood sample would have been successfully obtained. Thus, admissible confession.

State in Interest of J.G., 701 A.2d 1260 (N.J. 1997).
Juveniles previously found delinquent of sexual assault were required by state to submit to compulsory HIV blood testing, in accordance with NJ statute requiring such tests at request of victim. Argued that this violated 4th Amendment unreasonable search and seizure rules. Held that HIV blood draws from sex offender at request of victim (allowed by state statute) do not violate individual's federal or state rights (4th Amendment v. unreasonable search & seizure) provided that the court first finds probable cause that the offender has possibly exposed victim to risk of HIV transmission. (E.g., no risk of transmission when only contact is insertion of a foreign object at direction of offender, which still constitutes "sexual assault," though no bodily fluids could be exchanged.)

Examples of other state cases with similar findings:

- *Johnetta J. v. Municipal Court*, 218 Cal.App.3d 1255 (1990).
- *People v. Adams*, 149 Ill.2d 331 (1992).
- *In the Matter of Juveniles A, B, C, D, E*, 121 Wash.2d 80 (1993).
- *Matter of Appeal in Maricopa County Juvenile Action No. JV-511237* 938 P.2d 67 (Ariz.App. Div. 1,1996). Juve-

nile court could not order HIV testing of juvenile as condition of probation except upon request of victim, or victim's parent or guardian, and (2) probationary term ordering juvenile not to "patronize any place where sexually stimulating or sexually-oriented material or entertainment is available" was unconstitutionally vague.

- *Matter of Appeal in Maricopa County Juvenile Action Numbers JV-512600 and JV-512797* 930 P.2d 496 (Ariz.App. Div. 1,1996). The Court of Appeals held that: (1) juveniles could be required to submit to DNA testing based on delinquent acts occurring prior to enactment of statutes mandating such testing; (2) DNA testing statutes are constitutionally permissible and do not violate juveniles' right to privacy or right to be free from unreasonable searches and seizures; (3) State Constitution's grant of exclusive jurisdiction over child to juvenile court is not violated by statute allowing use of DNA test results after juvenile is 18 years old; and (4) mandatory DNA testing statutes do not violate purposes of juvenile court of rehabilitation and treatment.
- *In Interest of R.L.I.*, 771 P.2d 1068 (Utah 1989). Juvenile injured in car accident while driving under the influence. Utah statute requires individual's consent before blood test may be administered. Juvenile driver did not consent to blood test for BAC, nor was juvenile arrested. Officer nonetheless ordered juvenile's blood tested for alcohol while he was receiving treatment at the hospital after the accident. Juvenile moved to suppress evidence from blood alcohol test administered at hospital. Held that neither actual nor implied consent to the blood test was given, and therefore blood test findings and resulting conviction were invalid, because blood test data should have been suppressed. *note difference in case below:
- *State in Interest of M.P.C.*, 397 A.2d 1092 (N.J. Super. Ct. App. Div. 1979). Juvenile charged with delinquency in causing the death of another while driving under the influence of alcohol. Juvenile sought suppression of blood test evidence gathered during the course of receiving treatment at a hospital immediately following the accident, claiming that the information was privileged as a physician-patient communication. Court noted that blood tests are considered "communication," and the results contain private information that may be privileged as such. However, the court held that juvenile was not actually a "patient" under the meaning required for physician-patient privilege because he did not seek and receive aid *solely* for the purpose of treatment, *i.e.* there was probable cause to believe that his accident was a result of driving under the influence. ■

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6th Annual National Juvenile Defender Leadership Summit

October 25 through 27th the American Bar Association held its 6th Annual National Juvenile Defender Leadership Summit. Mr. Gault kicked off the conference as he hailed the importance of juvenile advocacy. Some great information was shared with those in attendance. DPA's Education Branch has a complete copy of conference materials available for review. Here are some highlights.

- James Bell, director of the W. Haywood Burns Institute for Juvenile Justice Fairness and Equity in San Francisco shared information about disproportionate minority confinement (DMC) work that he is doing across the country. Of note to Kentuckians was a trip taken by several stakeholders in Kentucky's juvenile justice system. Senator Neal, Judge Adams of Hopkinsville, former DJJ Commissioner Ralph Kelly and Fayette County Chief of Police, Anthany Beatty traveled to Seattle, Washington to observe the community based DMC work facilitated in Seattle by Honorable Simmie Baer. The study group will present their observations to the Subcommittee for Equity and Justice for all Youth (SEJAY), which is Kentucky's DMC committee.
- Another Californian, Winston Peters presented information on Los Angeles County Public Defender's use of Juvenile Accountability Incentive Block Grant Funding. That office receives a grant totaling over a million dollars dedicated to establishing the Client Assessment Recommendation Evaluation Project or C.A.R.E. The project integrates three psychiatric social workers, four paralegals, and three mental health and educational resource specialist attorneys into the public defender defense system. Assessments are done by the office of children at the earliest stages in the case. The staff then make recommendations for treatment and provide links to wrap around services. Children have access to counsel to the degree necessary for successful reintegration into the community. The grant brings resources to the table that provide defense counsel with resources equal to that relied upon by the state.
- Panelists reviewed and discussed a Pennsylvania statutory rape case wherein one eleven year old was prosecuted for statutory rape upon another eleven year old. One child's grandmother brought the complaint against the other child. Both children were willing participants in the activities. The trial court found that the only legitimate focus of concern was the victim because of his status as a delicate minor. The Pennsylvania Superior Court reviewed the statutes, analyzed legislative intent and determined that once a *per se* mental ability or disability is assigned to persons in an age group, the same categorization cannot be applied to include some and exclude others of that same age, absent clear proof that exemption is justifiable. Many state statutes, including those in Kentucky are similar to Pennsylvania's statutes. Presenters emphasized the need to raise challenges to such illogical prosecutions.
- Attendees were also given a copy of the Final Report of the Blue Ribbon Commission on Youth Safety and Juvenile Justice Reform. D.C. Mayor, Anthony Williams and D.C. Judge Hamilton steered the commission. D.C. has taken on the challenge of looking at juvenile justice and community safety as one issue. The commission set forth a number of objectives and a timetable for achieving their goals. Their work provides a model for local and statewide reform.

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